

The Central Law Journal.*ST. LOUIS, DECEMBER 18, 1885.***DAVID DUDLEY FIELD.**

The above is a tolerably fair portrait of one who may be justly considered the most distinguished American lawyer now living. David Dudley Field was born in Haddam, Conn., Feb. 13, 1805. He is consequently now nearly eight-one years of age. He was graduated from Williams College in 1825. He studied law in Albany and afterwards in New York City, and was admitted an attorney and solicitor in 1828, and a counsellor in 1830. He immediately entered upon an active practice. As early as 1836 he began in New York the agitation of law reform and the reform of remedial procedure, and for fifty years he has been the foremost champion in English speaking countries of the codification of the law. A code of civil procedure, drawn by a commission of which he was a member, and enacted in 1848 by the legislature of New York, has been subsequently adopted with little modification by many of the States, and has formed the basis of the sweeping law reforms which were enacted in England in 1873 and 1875. The history of his efforts in behalf of codification would be a history of codification itself in the State of New York. It would show that, owing to a blind and unreasoning opposition-

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his efforts have so far been only in part successful. His crowning work in this regard was his draft of a civil code, presented to the New York legislature for the first time in 1865. Although it has been pronounced by the most eminent legal scholars in America and Europe to be a masterpiece of analysis, it has never been enacted in New York; but, if we are not mistaken, has been twice defeated by governor's vetoes, and twice by adverse majorities in the legislature. It was, however, enacted in California in 1872, and has furnished the basis of civil rights in that State from that day to this. The territory of Dakota followed the example of California, and we shall soon have the spectacle of a fourth State in the Union which is governed by a civil code. The first is Louisiana; the second is Georgia, whose civil code, prepared by Mr. Cobb in 1863, during the throes of the civil war, has remained the law of that State ever since; the third is California, and the fourth will be Dakota. Mr. Field has extended his efforts in behalf of the codification of the law to the subject of the law of nations, and is the principal author of an ideal international code submitted to a committee of jurists of various countries appointed by the British Association for the Promotion of Social Science, in 1866, of which committee he was a member. He is a member of the Association for the Reform and Codification of the Law of Nations, and will attend the session of that body in Europe next summer. Though an octogenarian, Mr. Field is still in active practice. His eye is bright; his step is elastic; his voice is as tender and musical like that of a woman. His manner is, for the most part, conciliatory and urbane; but when crossed by an unreasonable adversary he is a very war-horse in debate. The stupid, malicious and even uncandid opposition to the codification of the law which he encounters in the New York Bar Association, and elsewhere, arouses in him a power of debate which reminds one of Tennyson's idealized King Arthur:

"In this heathen war the fire of God
Fills him; I never knew his like; there lives
No greater leader."

CURRENT EVENTS.

ABSENT HEIRS AND NEXT OF KIN.—Some two hundred visionaries assembled the other day in St. Louis to talk over the question of how to get possession of the modest sum of \$800,000,000.00 said to be held by the Accountant-General of the English Court of Chancery for the heirs of what was called the Chase-Townley estate. The daily papers dished up to their readers two or three columns of each day's proceedings, interspersed with numerous portraits of the so-called "heirs," male and female. The fool-killer did not make his appearance, and all of them dispersed to their respective homes without physical harm and with undiminished "expectations."

THE NEXT MEETING OF THE AMERICAN BAR ASSOCIATION.—We learn from private advices that the next meeting of the American Bar Association will again be held at Saratoga Springs. So far as we know, this is the only body of national reputation and importance which meets habitually in a little out-of-the-way place where there are no newspapers capable of publishing its proceedings. At its last meeting a Saratoga daily paper contained, in the space of two or three inches, a notice of its proceedings for the preceding day, and in the same issue devoted two or three columns to a ball given by one of the leading hotels. The manner in which this body would be treated in Chicago or St. Louis is well illustrated by the handsome way in which the daily papers of St. Louis have treated the two annual sessions of the Cattlemen's Convention which have met here. A full page in each of the leading morning papers was devoted to the proceedings, and numerous portraits of the more conspicuous members of the association were published. As the American Bar Association carries on its work now, its proceedings do not reach or attract popular attention, except indirectly through its members.

THE PRESIDENT'S RECOMMENDATION TOUCHING THE RE-ORGANIZATION OF UNITED STATES COURTS.—The President in his annual message, referring to the recommendations con-

tained in the report of the Attorney-General, submits the following: "The condition of the business in the courts of the United States is such that there seems to be an imperative necessity for remedial legislation on the subject. Some of these courts are so overburdened with pending causes that the delays in determining litigation amount often to a denial of justice. Among the plans suggested for relief is one submitted by the Attorney-General. Its main features are the transfer of all the original jurisdiction of the Circuit Courts to the District Courts, and an increase of judges for the latter; where necessary, an addition of judges to the Circuit Courts, and constituting them exclusively courts of appeal, and reasonably limiting appeals thereto; further restrictions of the right to remove cases from the State to Federal courts; permitting appeals to the Supreme Court from the courts of the District of Columbia and the territories only in the same cases as they are allowed from State courts, and guarding against an unnecessary number of appeals from the circuit courts. I approve the plan thus outlined, and recommend the legislation necessary for its application to our judicial system." It remains to be seen whether this will have the effect of producing the needed legislation at the present session of Congress. Past Congresses have been shamefully remiss in this regard, and their remissness has afforded a conspicuous illustration of public men placing party interests above the public welfare. While the Republicans held the Presidency and the Senate, and the Democrats held the House of Representatives, no measure increasing the number of Federal judges could be got through, because the new appointees would inevitably be selected from the Republican party. Now that the Democrats hold the Presidency and the House, and the Republicans hold the Senate, we presume that the same reasons will control to prevent the needed relief. It is a very great shame.

REWARDING PARTIZANS WITH JUDICIAL APPOINTMENTS.—The practice of rewarding political partisans with judicial appointments has been in vogue since the foundation of our government. The two great Chief Jus-

tices, Marshall and Taney, were conspicuous illustrations of this. Marshall, as a politician, was the tool of John Adams; Taney, as a politician, was the tool of Andrew Jackson. Each had his reward, and each disappointed the process which elevated him to power, by establishing a distinguished judicial reputation. From first to last, Federal appointments to the judiciary have been almost entirely political. During the twenty-four years of Republican ascendancy, there were but two or three exceptions to this rule, and they took place during the administration of Mr. Hayes. Keyes, appointed by Mr. Hayes to the judgeship of the Eastern District of Tennessee, was a kind of Democrat, though a member of Mr. Hayes' cabinet; and Hammond, appointed by Mr. Hayes to the same office for the Western District of Tennessee, was a mild Democrat, or a mild Republican, which ever way you might choose to classify him. Both have made good judges. Arthur's judicial appointments were the best which were made by any Republican President; but his appointees were invariably Republicans. The present administration came into power with many promises touching Civil Service Reform; but there has been a wide gap between the promises and the fulfillment, and there is not the slightest doubt that this administration will, in this regard, follow in the wake of its predecessors. During Grant's administration, the Supreme Court of the United States was "doctored" in the interest of party politics to secure a reversal of the legal tender decision. If there ever was a time which justified the "doctoring" of that court with reference to a great constitutional question, it is now, when it has, by a bare majority, announced the doctrine that it is competent for the Federal Tribunals to take one of the States of the Union by the throat and prevent it from collecting its revenue.

TRIALS OF PETTY FEDERAL OFFENCES BEFORE UNITED STATES COMMISSIONERS.—The President, in his annual message, takes hold of certain abuses in the administration of Federal justice in the right spirit. On one subject, which has been for years a matter of flagrant and notorious abuse—so much so as

to make men doubt at times whether they lived in a free country—he says: "In connection with this subject I desire to suggest the advisability, if it be found not obnoxious to constitutional objection, of investing United States Commissioners with the power to try and determine certain violations of law within the grade of misdemeanors. Such trials might be made to depend upon the option of the accused. The multiplication of small and technical offences, especially under the provisions of our internal revenue law, renders some change in our present system very desirable, in the interests of humanity as well as economy. The district courts are now crowded with petty prosecutions, involving a punishment in cases of conviction of only a slight fine, while the parties accused are harassed by an enforced attendance upon courts held hundreds of miles from their homes. If poor and friendless they are obliged to remain in jail during months, perhaps, that elapse before a session of court is held, and are finally brought to trial, surrounded by strangers, with but little real opportunity for defense. In the meantime, frequently, the marshal has charged against the Government his fees for an arrest, the transportation of the accused and the expense of the same, and for summoning witnesses before a commissioner, a grand jury and a court. The witnesses have been paid from the public funds large fees and traveling expenses, and the commissioner and district attorney have also made their charges against the Government. This abuse in the administration of our criminal laws should be remedied, and if the plan above suggested is not practicable, some other should be devised."

COMPENSATION OF UNITED STATES MARSHALS AND ATTORNEYS.—On this subject the President's annual message contains the following suggestions, which are worthy of careful attention: "The present mode of compensating United States Marshals and District Attorneys should, in my opinion, be changed. They are allowed to charge against the Government certain fees for service, their income being measured by the amount of such fees, within a fixed limit as to their annual aggregate. This is a direct induce-

ment for them to make their fees in criminal cases as large as possible in an effort to reach the maximum sum permitted. As an entirely natural consequence, unscrupulous marshals are found encouraging frivolous prosecutions, arresting people on petty charges of crime and transporting them to distant places for examination and trial, for the purpose of earning mileage and other fees; and District Attorneys uselessly attend criminal examinations far from their places of residence, for the express purpose of swelling their account against the government. Actual expenses incurred in these transactions are also charged against the Government. Thus the rights and freedom of our citizens are outraged and public expenditures increased, for the purpose of furnishing public officers pretexts for increasing the measure of their compensation. I think that Marshals and District Attorneys should be paid salaries, adjusted by a rule which will make them commensurate with services fairly rendered."

RECOMMENDATIONS IN THE REPORT OF THE ATTORNEY GENERAL.—The Attorney-General suggests the advisability of building jails at each place in the country where United States Courts are held. The necessity of building a Government Penitentiary, where all persons convicted of United States offenses could be confined, is strongly urged. Such convicts, he says, could be employed in the manufacture of supplies for the Government, which work would assist in making the institution self-sustaining. He also suggests the propriety of erecting on the grounds adjoining the Department of Justice a proper building for the accommodation, in addition to that department, of the Supreme Court and other proper courts and commissions of the United States. The Attorney-General makes a number of other recommendations, among which are the following: That the fees of marshals in Montana, Idaho, and Wyoming be doubled; that the salaries of marshals be revised; that the compensation of the United States attorneys for New Mexico and Arizona be increased; and that the compensation of clerks of United States Courts in California be reduced; that attorneys and marshals be required to make returns by fiscal instead of

calendar years; that the accounts of chief supervisors of election be taxed in open court, under the inspection of the District Attorney; that the penalty for the punishment of persons resisting officers be made more severe; that increased provisions be made for the protection of United States witnesses; and that a suitable United States Jail be built at Fort Smith, Ark. The report closes with a brief statement of the Union Pacific Railway litigation, and says that a motion will be filed by the Government in the Supreme Court in a few days to advance the appeals on the dockets, so as to have a speedy determination of them. The Attorney-General adds that the motion will doubtless be granted and the matter disposed of at an early day.

BUSINESS IN THE COURTS OF THE UNITED STATES.—The annual report to Congress of Attorney-General Garland gives a detailed and succinct statement of the operations of that department throughout the country during the past year, including the business of the Supreme Court, the Court of Claims and the Court of Commissioners of Alabama Claims. During the year, 1,658 civil suits and 11,977 criminal prosecutions were terminated in the various United States courts, leaving 2,146 of the former class and 3,808 of the latter class pending at the close of the year. The aggregate amount of judgments rendered in favor of the United States in civil suits during the year was \$677,783, and the amount actually collected on these judgments was \$170,457, while \$37,028 was obtained during the year on judgments rendered in former years for the United States and \$144,452 was otherwise realized in civil suits. The aggregate amount of fines, forfeitures and penalties imposed during the year in criminal prosecutions was \$481,756, and the amount of these fines, forfeitures and penalties collected during the year was \$62,124, while \$6,187 was realized on fines, forfeitures and penalties imposed in former years. The aggregate amount of court expenses paid during the year was \$2,874,733.

NOTES OF RECENT DECISIONS.

INJUNCTION. [PRIVATE INTERNATIONAL LAW—EXEMPTION LAWS.] INJUNCTION TO RESTRAIN THE PROSECUTION OF A CLAIM IN ANOTHER STATE AGAINST A CITIZEN OF THE STATE OF THE FORMER FOR THE PURPOSE OF EVADING THE DOMESTIC EXEMPTION LAW.—It is well known that statutes exist in most of the Western States exempting the wages of laborers from attachment and execution. It is also well known that some of the courts have refused to give effect to the exemption laws of other States, in respect of citizens of other States happening to be within their limits.¹ This has had a somewhat peculiar result in the case of claims against laborers employed by railway companies whose lines extend through several States—as, for instance, the Missouri Pacific Railway. A creditor of such a railway laborer, in Texas for instance, finding himself unable to collect his demand by the aid of legal process in Texas by reason of the exemption law of that State, sends the claim to a lawyer in Missouri, who at once brings an action by original attachment, summoning the Missouri Pacific Railway Company as garnishee. Now, the railway laborer is a thousand miles away and cannot come to Missouri to litigate the matter without losing his job, and the railway company cannot set up his right of exemption, since that is a right personal to the debtor, which cannot be pleaded by the garnishee. The maneuver is effective, and the exemption law of Texas is evaded, notwithstanding the fact that Missouri has a similar exemption law. This is an abuse of legal process, because it is contrary to a public policy which exists in both States and which is manifested by their legislation. But by what means can it be checked? This question has been answered in the case of *Wilkinson v. Colter*,² recently heard in the Superior Court of Shawnee County, Kansas, before Webb, J. The learned judge holds that the railway laborer may have a remedy against his creditor by

injunction; deciding, as we understand the case, and as the *syllabus* states, that "a citizen of Kansas may be enjoined from prosecuting an action in another State against another citizen of this State brought to subject the earnings of the latter to the payment of his debts, when by the laws of this State such earnings are exempt." The use of a writ of injunction by a debtor to prevent his creditor from collecting his debt, seems at first blush somewhat novel. But we live in an age of judicial progress, and this is certainly not more novel than the placing of a railway in the hands of a receiver on the petition of the corporation which owns it; and it is not unlikely that the ruling of the learned judge, if the case should get before the Supreme Court of Kansas, may turn out to be the law. He reasons the question well; points out the absence of any other remedy to save to the debtor a right conferred upon him by the law of the forum, and points out that, whereas the writ of injunction acts only against a litigant party, there is no jurisdictional difficulty in restraining a party from wrongfully prosecuting an action in another forum. On this last point, we understand that there is a conflict of authority, and altogether the conclusion arrived at may be envied with more difficulties than would at first appear.

DOWER. [CONVEYANCE—ESTOPPEL.] RELEASE OF DOWER NOT IN CONFORMITY WITH STATUTE NO ESTOPPEL.—In *Mason v. Mason*,³ it is held by the Supreme Judicial Court of Massachusetts that a wife in the lifetime of her husband, can bar her right of dower in no other mode than as prescribed by statute; and any conveyance of the right, void at law, cannot operate against her, by way of estoppel, in equity. "The instrument signed by the plaintiff," said Devens, J., "whether considered as a conveyance or as a contract, is therefore void at law. If such be the case, it cannot operate against the demandant by way of estoppel in equity. A court of equity cannot take jurisdiction to give effect to and recognize instruments, which under the statute law are inoperative."⁴ The reason of the

¹ *Boykin v. Edwards*, 21 Ala. 261; *Morgan v. Neville*, 74 Pa. St. 32; *Newell v. Hayden*, 8 Iowa, 140; *Helfenstein v. Cave*, 3 Iowa, 287; *Baltimore etc. R. Co. v. May*, 26 Oh. St. 347; *Contra*, *Pierce v. Chicago etc. R. Co.*, 26 Wis. 388; s. c., 2 C. L. J. 377.

² Kan. L. J. 202.

³ 1 New Eng. Repr. 106.

⁴ *Citing Merriam v. B. C. & F. R. Co.*, 117 Mass. 244.

rule is very obvious. At common law a married woman is incapable of entering into any binding contract;⁵ her engagements are not voidable merely, but are absolutely void,⁶ so as to be incapable of ratification, and so as not to furnish a good consideration for a subsequent agreement made after becoming discoverer.⁷ She cannot, therefore, at common law, be estopped by anything in the nature of a contract, whether it be a deed⁸ or other writing under seal,⁹ or an oral promise;¹⁰ for it would be absurd and contradictory to hold that she is absolutely disabled from making a contract, and yet that her attempted contract may be good by way of estoppel.¹¹ Statutes which enable her to contract in a given particular are in derogation of the common law, and are hence not to be enlarged by construction. They are enabling acts making exceptions to the general rule, and where they prescribe a mode in which she may part with her title to or interest in lands, they necessarily exclude all other modes; for any rule which would admit of other modes would not only be in derogation of the rule of the common law which imposes this general disability upon her, but would in fact repeal the statute.¹² No conveyance, therefore, of her interest in lands will be good unless executed and acknowledged in substantial conformity with the statute which enables her so to convey.¹³ Nor will equity dispense with the law, or enlarge the power conferred by the legislature, or uphold a different mode of its exercise; but in this

regard the rule applies that equity follows the law. Therefore a title-bond or other agreement to convey land in future, not executed and acknowledged by a married woman as prescribed by the statute, will not be enforced in equity.¹⁴ The fact that she may have received full value will not enable a court of equity to interpose.¹⁵ In Pennsylvania no equities can be interposed against her in favor of one who enters into possession of her lands under an informal conveyance from her and makes improvements in good faith.¹⁶ On the contrary, the husband and wife¹⁷ or the heirs of the wife¹⁸ may, notwithstanding such defective conveyance, recover the lands in ejectment, though one court has held that the circumstances may be such that the fraud of the wife will estop the husband.¹⁹ And the wife may convey a good title to a third person by a deed properly acknowledged.²⁰ The doctrine extends so far that a fraud practiced by the wife, whereby she pretends to sell her land, gets a good consideration for it, and then refuses to execute a conveyance in conformity with the statute, will not afford ground of an action for damages for the deceit against her and her husband,²⁰—as where she procures the contract from the other party by representing herself as unmarried.²¹

FOREIGN CORPORATION. [STOCKHOLDERS].
ENFORCEMENT OF LIABILITY OF RESIDENT
STOCKHOLDERS IN A FOREIGN CORPORATION.—
In the case of *Nimick v. Mingo Iron Works*

⁵ *Marshall v. Rutton*, 8 Term Rep. 545; *Grasser v. Eckert*, 1 Binn. 575, 586.

⁶ *Glidden v. Strupler*, 52 Pa. St. 400; compare *Thorn-dell v. Morrison*, 25 Pa. St. 326; *Baxter v. Bodkin*, 25 Ind. 172.

⁷ *Lowell v. Daniels*, 2 Gray, 161; *Stevens v. Parish*, 29 Ind. 260; *Kirkland v. Hepselgeser*, 2 Grant Cas. 84; *McClure v. Douthitt*, 3 Pa. St. 446; s. c., 6 Pa. St. 414; *Jackson v. Hobhouse*, 2 Mer. 483.

⁸ *Glidden v. Strupler*, 52 Pa. St. 400; *Shumaker v. Johnson*, 35 Ind. 33; *Nicholl v. Jones*, 36 L. J. (Ch.) 554; *Fowler v. Shearer*, 7 Mass. 14.

⁹ *Ogelsby Coal Co. v. Pasco*, 79 Ill. 164.

¹⁰ *Todd v. Pittsburgh etc. R. Co.*, 19 Ohio St. 514, 525; *McBeth v. Trabue*, 69 Mo. 642; *Behler v. Weyburn*, 59 Ind. 143.

¹¹ *Todd v. Pittsburgh etc. R. Co.*, 19 Ohio St. 514, 526.

¹² *Ibid.* See 2 Story's Eq. Jur. § 139; *Lowell v. Daniels*, 2 Gray, 161; *Behler v. Weyburn*, 59 Ind. 143; *Wood v. Terry*, 30 Ark. 385.

¹³ *McDaniel v. Grace*, 15 Ark. 465; *Stillwell v. Adams*, 20 Ark. 346.

¹⁴ *Wood v. Terry*, 30 Ark. 385; *Huff v. Price*, 50 Mo. 228. Compare *Butler v. Buckingham*, 5 Day, 501; *Whiteley v. Stewart*, 63 Mo. 360; *Stevens v. Parish*, 29 Ind. 260; *Glidden v. Strupler*, 52 Pa. St. 400, 403; *Pettit v. Fretz*, 33 Pa. St. 118, 120.

¹⁵ *Stevens v. Parish*, 29 Ind. 260; *Glidden v. Strupler*, *supra*. Compare *Huff v. Price*, 50 Mo. 228.

¹⁶ *Glidden v. Strupler*, *supra*; citing *Crest v. Jack*, 3 Watts, 238; *Carr v. Wallace*, 7 Watts, 394. An analogous doctrine has been declared in Pennsylvania in relation to conveyances made by lunatics. *Rogers v. Walker*, 6 Pa. St. 371, 374.

¹⁷ *Danner v. Berthold*, 11 Mo. App. 351.

¹⁸ *McClure v. Douthitt*, 6 Pa. St. 414; s. c., 3 Pa. St. 446.

¹⁹ *Danner v. Berthold*, *supra*.

²⁰ *Kirkland v. Hepselgeser*, 2 Grant Cas. 84.

²¹ *Curd v. Dodds*, 6 Bush, 681; *Owens v. Snodgrass*, 6 Dana, 229.

²² *Keen v. Hartman*, 48 Pa. St. 497; *Adelphia Loan Association v. Fairhurst*, 9 Exc. 422.

Co.,²² decided by the Supreme Court of Appeals of West Virginia, Nov. 29, 1884, a manufacturing company incorporated and organized under the laws of the State of Ohio, which imposed on the stockholders of such company an individual liability in addition to their stock equal to the amount of the stock held by each of them, as a security to its creditors for the payment of the debts of the corporation, having become insolvent, one of its judgment creditors, on his own behalf and for the benefit of all other creditors, instituted his suit in the municipal court of Wheeling against the corporation and certain of its stockholders residing within the jurisdiction of that court, to ascertain and determine the extent of the personal liability resting upon each of them for the payment of the debts of the corporation, and to enforce payment of the same. To this bill the defendant stockholders demurred, and the court sustained the demurrer, and dismissed the bill with costs. Upon an appeal from this decision the Supreme Court of Appeals hold the following propositions: 1. That the stockholders of such a corporation are individually liable to the creditors thereof, if the same be necessary for the payment of its debts, in addition to their stocks in an amount equal to the stock by them subscribed or otherwise acquired. 2. That this liability is not in the nature of a penalty or forfeiture, but it arises out of the implied promise of the stockholder to assume and discharge the individual liability imposed by the statute, under which the corporation was created. 3. That this liability is not a primary resource or fund for the payment of the debts of the corporation; that it is collateral and conditional to the principal obligation which rests upon the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or when payment cannot be enforced against it by the ordinary process. 4. That this liability is a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities can have no control; that it is several in its nature, but that the right arising out of it is intended for the common and equal benefit of all creditors of the corporation. 5. That in

any suit instituted for the purpose of enforcing this liability against the stockholders the corporation is a necessary party. 6. That the statute-law of Ohio, under which such corporation was created, imposing on such stockholders such individual liability, not only conferred upon its creditors a new right, but also prescribed the remedy whereby the same may be enforced. 7. That the remedy so prescribed for the ascertainment and enforcement of this liability must be pursued in the courts of the State of Ohio, where the corporation was located, and by the local statutes of which alone the liability exists. 8. That a bill in equity to ascertain and determine the extent of this individual liability against the stockholders of such corporation cannot be sustained in the courts of West Virginia. 9. That in the interpretation of the statutes of another State this court will adopt the construction given to such statutes by the highest judicial tribunal of such State, unless the same be in contravention of the Constitution of the United States.

It does not appear how the court obtained its judicial knowledge of the Ohio statutes; but, having come to the conclusion from an examination of them that all the stockholders and the corporation were necessary parties to the suit, and that a statutory and peculiar remedy must be pursued, the decision in the case was made to turn on these points, and the court escapes the imputation that it has refused to administer justice between man and man. As this decision leaves them, the creditors have no remedy against the majority of the stockholders, either in Ohio or West Virginia; for the stockholders and the corporation in Ohio cannot be brought into the courts of West Virginia. It is to be observed that the Ohio court cut the technicality as to parties insisted upon in this case, and rendered a judgment against the fifteen resident stockholders. The refusal to enforce the laws of another State because it would overburden the courts, is a far more plausible reason for not entertaining the suit than that of the non-joinder of the foreign stockholders and the corporation.²³ It is universally conceded, it is believed, by the courts, that this liability of the stockholders arises out of a contract or

²² 25 W. Va. 184, (advance sheets.)

²³ See *Bonewitz v. Van Wert County Bank*, 41 Ohio St.; S. C., 1 Amer. L. Jour. 77.

quasi-contract, and that they are individually liable. And in those courts where it is not necessary to join all of them as defendants, two or more of them may be joined in the same action, either at law or in equity, or the remedy may be in the particular State.²⁴ The case of *Errickson v. Nesmith*,²⁵ was a suit brought in Massachusetts to enforce a liability arising under the charter of a New Hampshire corporation. In the latter State the liability could be enforced only by a bill in chancery, a law which the Massachusetts courts would not recognize as binding upon them, and in the nature of things only valid in New Hampshire, as it prescribed the particular form in which the remedy must be sought,—the court holding “that when a statute creates and prescribes a remedy, that remedy is exclusive, and no other can be pursued.” In the earlier case it was said, that “when the statute confers a right, and prescribes a remedy, that particular remedy, and that only, can be pursued.”²⁶ A ruling was made in *Bank of Virginia v. Adams*,²⁷ denying the right of foreign creditors, as against the stockholders generally.²⁸ The case of *Halsey v. McLean*,²⁹ was severely criticised in *Flash v. Conn.*³⁰ The two cases were founded upon the same statute, and a diametrical result reached. Both were suits to enforce the liability of a stockholder (not in the nature of a penalty); and in Massachusetts it was held “that the liability of stockholders for debts due to laborers, * * qualified, as it is, by the provisions as to the remedy in section 24, [of the statute], must be treated as a part of the statute system of another State, incapable of execution *alieno foro*.” The Florida court makes no objection to the decision in *Errickson v. Nesmith*; and say “We cannot regard the New Hampshire decision as laying down any principle applicable to the case at bar which will pre-

clude the courts of that State from entertaining this plaintiff's suit. The ruling of the courts of New York, where the company was incorporated, is to the effect that the stockholders are liable by the terms of the act of incorporation, which is the substance of their contract, in the first instance, for the debts of the company, not, as insisted by the defendant, upon the failure of the officers to file their certificate; but are so liable to the amount of their stock until the happening of a certain event, for all the debts contracted to be paid within one year after suit and execution against the company in its corporate capacity. These terms are but limitations of the liability which was incurred by the contracting of the debt, and do not create liabilities depending upon any other event.” If the liability imposed is in the nature of a penalty imposed by statute, as against an officer for not making a report required by statute, the action cannot be maintained in another State; and this is true even if the penalty is imposed on a stockholder and his liability is measured by the amount of the stock he holds at the time of the suit or when the penalty attaches.³¹ The Florida and New York cases are distinguishable from the West Virginia case in that they were simply actions at common law, and not an action specifically prescribed by statute. Thus in *ex parte Van Riper*,³² which was an action brought in New York to enforce a stockholder's liability created by a New Jersey statute, it was said: “The charter does not confine the creditor to any particular remedy. It raises in his favor a debt against an individual, and leaves his remedy to the general methods of the law. This view also answers another objection, that the remedy given by the charter is local to the State of New Jersey. The charter, in fact, institutes no remedy. It binds Van Riper as a debtor. It raises a debt against him, which may in its own nature, be enforced wherever the debtor or his property can be found, according to the forms of law at the place where found.” Other cases announce a similar doctrine, and allow an action against the

²⁴ *Overmyer v. Cannon*, 82 Ind. 457; *Gulliver v. Roelle*, 100 Ill. 141; *Harper v. Union Manufacturing Co.*, 100 Ill. 225; *Black v. Worner*, 100 Ill. 328; *Weeks v. Love*, 50 N. Y. 568. See *Pollard v. Bailey*, 20 Wall. 520; *Boyd v. Hall*, 56 Ga. 563.

²⁵ 15 Gray, 221.

²⁶ *Errickson v. Nesmith*, 4 Allen, 233.

²⁷ 1 Pars. (Pa.) Sel. Cas. 534.

²⁸ See *Pickering v. Fisk*, 6 Vt. 102, suit on a foreign statutory bond, right denied.

²⁹ 12 Allen, 478.

³⁰ 16 Fla. 428; s. c., 26 Am. Rep. 721.

³¹ *Derickson v. Smith*, 3 Dutch (N. J.) 166; *Bird v. Hayden*, 1 Robt. (N. Y.) 383; s. c., 2 Abb. (N. S.) 61; *First National Bank of Plymouth v. Price*, 33 Md. 487; s. c., 3 Amer. Rep. 204.

³² 20 Wend. 614.

stockholders.³³ As the result of this examination it may be stated that the usual liability of a stockholder for the debts of the corporation, to the extent of the value of his stock, is a liability on a contract, and not a penal liability; and, with the exception of the Pennsylvania case, it can be enforced in a State foreign to the State in which the corporation is formed, if the action is one in general use, either in a court of law or equity; but if a peculiar remedy is prescribed by a statute of the State in which the corporation is created, the courts of another State will not enforce the liability of the stockholder.³⁴

W. W. T.

³³ *Munger v. Jacobson*, 99 Ill. 349; *Winter v. Baker*, 60 Barb. 432; 34 How. Pr. 180; *Salt Lake City National Bank v. Hendrickson*, 11 Vroom, (N. J.) —; *Perkins v. Church*, 31 Barb. 84; *Bronson v. Wilmington, Life Ins. Co.*, 85 N. C. 411. In this last case it was alleged in the bill that it was not practicable to bring all the stockholders before the court; and this seems to have been deemed a sufficient excuse. *Hodgson v. Cheever*, 8 Mo. App. 318 (point expressly decided).

³⁴ See further on this subject, *Patterson v. Lynde*, *ante*, 90, and Mr. Bantz' note, *ante*, 92; also *Brundage v. Monumental Silver Mining Co.*, *ante*, 94.

RIGHTS OF A PERSON SUFFERING AN INJURY WHEN VIOLATING THE SUNDAY LAW.

Can a person recover damages for an injury sustained by him in his person or property which was received while he was violating the so-called Sunday laws? Not in all the States is this question answered in the same way, nor, sometimes, even in the same State.

Suppose one is traveling on Sunday in violation of these laws, can he recover for an injury sustained by reason of a defective highway, either to his person or to his property? In such an instance he is a violator of the law unless going on a journey of necessity, charity or mercy, when he is entitled to recover, if he otherwise has a good cause of action.

In an early case in Massachusetts the question arose whether a town was liable for an injury sustained on the Lord's day, by one traveling, by reason of a defective highway. The court held that, the plaintiff being at the time he sustained the injury engaged in an act prohibited by the statutes of the State, he

could not recover; that his unlawful act contributed to the injury.¹ This case has been followed by a number of cases in the State of its origin, to the effect that such a person contributes to his own injury because of the very fact that he was violating the law at the time he received the injury, and that that fact alone is conclusive evidence of his contributory negligence; and from the further fact that, being himself in the commission of a crime, the law will not aid him.²

In one case the doctrine was carried to an extreme. A person traveling on Sunday stopped at a hotel and left his horse, wagon and buffalo robe in charge of the landlord's servant. After remaining over night at the hotel, on Monday morning the robe could not be found. It was held that the landlord was not liable for its loss, on the ground that the traveling in order to reach the hotel was illegal.³

But in a recent case where the injury was sustained while out sailing for pleasure in a yacht, by a steamboat running it down, it was held that the injured person could recover if the collision was caused by the wantonness and malice of those in charge of the steamboat.⁴

In Vermont a case of this kind came before the Supreme Court. The court repudiated the doctrine of the Maine and Massachusetts cases, already cited, that the injured person by traveling on Sunday contributed to the happening of the accident; for if the day had been Monday the injury would have happened. The court repudiated the theory also that the plaintiff could not recover because he was at the time violating the law. But the court denied the plaintiff's right to recover upon the express ground that the town was under no obligation to furnish him a safe highway to travel on at a time when he was by law forbidden to travel. "The plaintiff when injured was forbidden by law to use the highway, and by reason thereof the defendant town owed him no duty to provide him any

¹ *Bosworth v. Swansey*, 10 Met. 363.

² *Lyons v. Desotell*, 124 Mass. 387; *White v. Long*, 128 Mass. 598; s. c., 35 Amer. Rep. 402; *Jones v. Andover*, 10 Allen, 18. So in Maine, *Hinckley v. Penobscot*, 42 Me. 89; *Bryant v. Biddeford*, 39 Me. 193.

³ *Cox v. Cook*, 14 Allen, 165.

⁴ *Wallace v. Merrimack River Nav. etc. Co.*, 134 Mass. 95; s. c., 45 Amer. Rep. 301.

kind of a highway, and therefore was under no liability for any insufficiency in any highway."⁵

In the three States previously referred to, the mere showing that the injury occurred on Sunday while traveling is sufficient to defeat the action, unless the plaintiff's evidence shows that he was traveling on an errand of necessity, charity, mercy, or to attend a religious meeting.

The question of necessity must be determined by its moral fitness and propriety.⁶ It need not be a physical necessity, or an absolute necessity. The law does not require such an excuse.⁷ In an early case it was held that a mail-carrier could travel on Sunday; but the passengers he carried were not for that reason excusable.⁸ Traveling from one city to another to visit a stranger is not traveling from necessity, although there may be conditions under which it would be.⁹ Nor is going to the house of a friend on a friendly visit; or to meet a brother by request so that he can have the week days to work, where the object of the visit is to arrange a business matter.¹⁰ But a father going to visit his children, who were living at a distance of eight miles with their aunt was held to be justified, and could recover for an injury sustained by reason of a defective highway. It was said that the act under the circumstances was fit and proper.¹¹ So a son may lawfully travel on Sunday to visit his father.¹²

So traveling on Sunday to go to a funeral is lawful, and the person attending is not bound to return home by the shortest route; but a divergence made for the purpose of visiting a friend is not allowable; and if an injury is sustained by reason of a defective highway passed over in going immediately to and from the friend, no damages can be re-

covered therefor.¹³ Likewise visiting the grave of a dead friend is an act of charity.¹⁴

Traveling to visit the sick is an act of charity, if the person traveling knows that the person whom he is going to see is sick, and he thinks he needs such assistance as on inquiry he may find necessary; and the plaintiff, on putting in evidence that he was traveling for the purpose of visiting the sick, is entitled to go to the jury on the question whether he was lawfully travelling, although he offers no evidence of the ground of his belief that the person he was going to visit was in need of assistance.¹⁵ So a mother may visit her sick child on Sunday.¹⁶ And where a brother traveled from one town to another for the sole purpose of visiting his invalid sister whom he believed to be ill, the person who drove him at his request, was held to be traveling from charity, and each one entitled to maintain an action for injuries received, even though the sole reason for the brother going was to enable him to be at his work on the following week without interruption.¹⁷

One walking for exercise does not violate the law, even though he turn aside from his regular course to get a friend to accompany him,¹⁸ or to get and drink a glass of beer; and in the both instances he may recover, unless, in the last case, the effects of the beer contributed to the injury.¹⁹

Where a maid servant, without her fault, was prevented from returning from her mother's house to her employer's on Satur-

late this statute. *Corey v. Bath*, 35 N. H. 531. In this State the traveling must be to the disturbance of others. *Dutton v. Weare*, 17 N. H. 34.

¹³ *Davis v. Somerville*, 128 Mass. 594; s. c. 35 Amer. Rep. 399. The same rule in a like case is applicable in Texas, where it was held that a contract entered into on Sunday for transportation to and from a funeral on that day was enforceable. *Gulf etc. R. Co. v. Levy*, 59 Tex. 542.

¹⁴ *Com. v. Johnston*, 10 Harris, (Pa.) 102; s. c., 2 Liv. L. Mag. 341. This case is good law in Maine, Massachusetts and Vermont.

¹⁵ *Doyle v. Lynn & Boston R. R. Co.*, 118 Mass. 196; s. c., 19 Amer. Rep. 431. This was a case of an injury received while traveling on a railway; but it is applicable to a case of an injury received by reason of a defective highway. See also *Bucher v. Fitchburg R. R.*, 108 Mass. 156, for a very strong case where it was held to be an unnecessary visit.

¹⁶ *Gorman v. Lowell*, 117 Mass. 65.

¹⁷ *Cronan v. Boston*, 136 Mass. 384.

¹⁸ *O'Connell v. Lewiston*, 65 Me. 34; s. c., 20 Amer. Rep. 673; *Hamilton v. Boston*, 14 Allen, 475.

¹⁹ *Davidson v. Portland*, 69 Me. 116; s. c., 31 Amer. Rep. 253.

⁵ *Johnson v. Irasburgh*, 47 Vt. 28; s. c., 19 Amer. Rep. 111; 14 Amer. L. Reg. 547. See *Holcomb v. Danby*, 51 Vt. 428.

⁶ See *Bennett v. Brooks*, 9 Allen, 118.

⁷ *Knox v. Commonwealth*, 6 Mass. 76.

⁸ *Knox v. Commonwealth*, *supra*.

⁹ *Stanton v. Metropolitan R. R.* 14 Allen, 485.

¹⁰ *Holcomb v. Danby*, 51 Vt. 428; see *Cratty v. Bangor*, 57 Me. 423; s. c., 2 Amer. Rep. 56.

¹¹ *McClary v. Lowell*, 44 Vt. 116; s. c., 8 Amer. Rep. 266.

¹² *Logan v. Matthews*, 6 Pa. St. 417; *Pearce v. Atwood*, 351. In New Hampshire a statute prohibited "any play, game, or recreation" on Sunday. One going on Sunday to make a social visit was held not to vio-

day night, it was held that she could lawfully return on Sunday morning, and that her master did not violate the law in going after her Sunday morning with a carriage, in order that she could prepare the morning meal.²⁰ But a man servant who worked at night in a mill and slept by day was held not to be lawfully traveling in going to see his master on Sunday in order to induce him to change his time of labor from night to day.²¹ And one traveling to see if a house, which he has rented, and into which he intends to move next day, has been cleaned, is not traveling from necessity or charity.²²

If the injured person was on his way to attend a religious meeting when he received the injury, he may recover;²³ "and," as Judge Cooley has said, "in this country, where religious opinion is free and entire religious equality is the rule of the law, no inquiry concerning the character of the services can be raised beyond this: Was the party on his way to the meeting for the honest purpose of divine worship and religious instruction? If so, the errors and absurdities of his belief, and the nature of the services, provided the laws of morality and public decency are not violated, are matters which concern only himself."²⁴

A person injured while traveling Sunday on a railway car stands in the same position as if he was injured by reason of a defective highway; and the same is true, in the three States referred to, in case of any injury received at the hands of another while engaged in an undertaking on that day, forbidden by the statute. Thus one aiding the owner to clear out his wheel pit and injured while doing so by the negligence of the owner, was denied relief, although he was acting gratuitously, and if the work was not done on that day a large number of hands would have lain idle on Monday.²⁵

A number of cases have arisen for an in-

jury to a horse where the horse was hired on Sunday for driving, or hired to be driven on Sunday. In Massachusetts where a horse thus hired for use on that day was injured by immoderate driving, it was held that there could be no recovery for the injury, as the plaintiff himself violated the law when he let the horse.²⁶ And where the letting was to go to one place and the bailee went to another and much farther place, and by reason of the distance and immoderate driving the horse was injured, no recovery was allowed.²⁷ But this last case has been overruled in effect and a recovery permitted;²⁸ and from a later case²⁹ it would seem that the court has entirely receded from the doctrine of the earlier case. And it is the doctrine of Maine,³⁰ Connecticut,³¹ and Michigan,³² that a recovery is permissible in such cases; with the limitation in Maine that if the injury is received while going on the exact journey for which the horse was let, no recovery will be allowed.³³

In Rhode Island where the defendant drove beyond the place for which he had engaged the horse, it was held that proof of the contract, which was illegal, was necessary to establish the injury (and therefore a conversion) and that the plaintiff was for that reason barred of his right to recover damages for the injury.³⁴ And the same rule was applied even where the horse was driven on a totally different journey, for the reason that it was necessary to show the illegal contract in order to recover, and as soon as that was introduced the action must fail.³⁵

In New York a recovery is permitted in such instances;³⁶ so in Arkansas,³⁷ Pennsyl-

²⁰ *Gregg v. Wyman*, 4 Cush. 322.

²¹ *Way v. Foster*, 1 Allen 408.

²² *Hall v. Corcoran*, 107 Mass. 251; s. c., 9 Amer. Rep. 30.

²³ *Lyons v. Desotelle*, 124 Mass. 387.

²⁴ *Martin v. Gloster*, 46 Me. 520. See *Bryant v. Biddeford*, 39 Me. 193.

²⁵ *Frost v. Plumb*, 210 Conn. 111; s. c., 16 Amer. Rep. 18; 13 Amer. L. Reg. 537. See also *Myers v. State*, 1 Conn. 502.

²⁶ *Fisher v. Kyle*, 27 Mich. 454.

²⁷ *Parker v. Latner*, 60 Me. 528; s. c., 11 Amer. Rep. 210.

²⁸ *Whelden v. Chappel*, 8 R. I. 230.

²⁹ *Smith v. Rollins*, 11 R. I. 464; s. c., 23 Amer. Rep. 509. See however, *Baldwin v. Barney*, 12 R. I. 392; s. c., 34 Amer. Rep. 670.

³⁰ *Harrison v. Marshall*, 4 E. D. Smith, 271; *Nodine v. Doherty*, 46 Barb. 59; s. c., 5 Amer. L. Reg. 346; *Bertholf v. Reilly*, 8 Hun, 16; s. c., 74 N. Y. 509.

³¹ *Steward v. Davis*, 31 Ark. 518; s. c. 25 Amer. Rep. 576.

²⁰ *Crossman v. Lynn*, 121 Mass. 301.

²¹ *Connolly v. Boston*, 117 Mass. 64; s. c., 19 Amer. Rep. 396. In Kentucky a litigant is not bound to travel on Sunday in order to reach the place of trial. *South v. Thomas*, 7 T. B. Mon. 59.

²² *Smith v. Boston & Maine R. R.*, 120 Mass. 490; s. c., 21 Am. Rep. 538.

²³ *Feital v. Middlesex R. R. Co.*, 109 Mass. 398.

²⁴ *Cooley on Torts*, 152.

²⁵ *McGrath v. Merwin*, 112 Mass. 467; s. c., 17 Amer. Rep. 119.

vania³⁸ and probably in New Hampshire.³⁹

In Massachusetts it was decided that one defrauded in the exchange of horses on Sunday had no cause of action;⁴⁰ and that an action would not lie for the conversion of a chattel delivered on Sunday in exchange for another, and retained by the defendant notwithstanding the return of the other by the plaintiff.⁴¹

The Massachusetts doctrine with respect to the non-liability of a town for an injury received while traveling on Sunday, from a defective highway, has been expressly repudiated in many of the States, and it has in fact, as we have seen, been somewhat weakened in that State in its application to other cases of injury from the tortious conduct of the defendant.

It is a familiar principle in the law of civil wrongs that to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury.⁴² Of this principle, in its application to the case of an injury received from defects in a highway while travelling on Sunday, the Supreme Court of Wisconsin has said: "To make good the defense (of illegality) it must appear that relation existed between the act or violation of law, on the part of the plaintiff, and the injury or accident of which he complains, and the relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events as one event is known to precede or follow another. It must have been some act, omission or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission or fault of this kind, with reference to a defect in the highway or in a bridge over which a traveller may be passing, unlawfully though it may be. The fact that the traveller may be violating this law of the

State, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, or that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial, also, that the traveler was within the exceptions of the statute, and traveling on an errand of necessity or charity, and so was lawfully upon the highway."⁴³

In consequence of this reasoning the plaintiff was allowed to recover in the case just quoted from for an injury to his drove of cattle suffered by a defective bridge breaking down on Sunday, although he was unlawfully travelling. And the same principle has been re-asserted in the State where it was so ably expounded in other cases;⁴⁴ even for an injury sustained while travelling aboard a railway car.⁴⁵ The same rule is applied in Minnesota,⁴⁶ in New York,⁴⁷ and in New Hampshire.⁴⁸

A steamboat illegally running on a Sunday came in contact with pilings unlawfully left in navigable waters and was damaged. In a suit against the company that left them in the place where they were the cause of the injury, the Supreme Court of the United States said: "The law relating to the observance of Sunday defines a duty of a citizen to the State, and to the State only. For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the torti-

³⁸ Berrill v. Gibbs, 1 Pa. L. Jour. 313; s. c., 3 Leg. Pa. N. 296.

³⁹ Woodmen v. Hubbard, 25 N. H. 67; s. c., 57 Am. Dec. 310.

⁴⁰ Robeson v. French, 12 Met. 24.

⁴¹ Myers v. Meinrath, 101 Mass. 306; see also Tucker v. Mowrey, 12 Mich. 378.

⁴² Cooley on Torts, p. 155.

⁴³ Sutton v. Wauwatosa, 29 Wis. 21; s. c., 9 Amer. Rep. 534. Even the Vermont Supreme Court acknowledges the correctness of this reasoning, but places its decision, as we have seen, on another ground. Johnson v. Irasburgh. *supra*.

⁴⁴ Alexander v. Oskosh, 33 Wis. 277; McArthur v. Green Bay and Mississippi Canal Co., 34 Wis. 277, a case of a boat unlawfully traveling and receiving an injury while passing through a lock.

⁴⁵ Knowlton v. Milwaukee City R. W. Co., 50 Wis. 278; s. c., 17 N. W. Rep. 17.

⁴⁶ Opahl v. Judd, 30 Minn. 128.

⁴⁷ Platz v. Cohoes, 24 Hun, 101; s. c., on appeal, 89 N. Y. 219; 42 Am. Rep. 286.

⁴⁸ Sewall v. Webster, 59 N. H. 596; Wentworth v. Jefferson, unreported; Corey v. Bath, 35 N. H. 531.

ous conduct of another, against whom the owner has committed no offense." ⁴⁰

In New York a passenger took passage on a ferry boat running in connection with a railroad. While on board the boiler burst, and he was injured. The immediate cause of the explosion was too great a pressure of steam. The boiler was old, and for that reason negligence was attributable to the company for carrying as high a pressure as it did. A supplemental finding was made by the referee that a crack in the boiler (which was the cause of the explosion), was a latent one, the existence of which was unknown to the defendant company, nor could it have been discovered by the highest skill, foresight or care, or by any test known and practiced by experts in the business of making, maintaining or managing steam boilers. It was contended that the plaintiff could not recover because he was travelling in violation of the law; but the court refused to sustain the objection, and entered judgment in his favor. The case seems to have been grounded upon the fact that the contract to carry was legal on the part of the railroad company, and the obligation to carry with care was incident to it. ⁴¹

In Massachusetts one unlawfully travelling on Sunday was bitten by the defendant's vicious dog, and it was held that he was not barred of his right of action; that his travelling was only an incident of the journey and not a contributory cause, and his illegal act could not affect him. ⁴² The same rule was adhered to in Iowa in a case of a dog

frightening horses. ⁴³ So in Pennsylvania it is no defense in an action for frightening horses by leaving a scare-crow in the highway that the plaintiff was travelling on Sunday. ⁴⁴

In the United States District Court for the State of Massachusetts a recovery was allowed a work-hand assisting in hauling a vessel into a port on the Lord's day, although the act was illegal. ⁴⁵ And in New York one unlawfully engaged in a game on that day was permitted to recover. ⁴⁶

Yet in Rhode Island, where the plaintiff, a resident of that State, was injured by another resident of that State, while driving in Massachusetts, it was held that he could not recover. The court seems to have assumed that the Massachusetts' statute was the same as that of its own State. It being against an individual, the court denied the relief sought, but intimated that if it had been against a municipal corporation for an injury received by reason of a defective highway, the result would have been different. ⁴⁷

Where the plaintiff is permitted to recover for an injury received on Sunday, he is not held to any greater degree of care than if he was performing the same act when he received the injury as on a week-day; nor is the defendant bound to use a greater degree of diligence. ⁴⁸ Nor can the fact that the tort was committed on Sunday be deemed to aggravate the damages for that reason. ⁴⁹

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⁴⁰ Philadelphia, etc. R. L. Co. v. Philadelphia etc. Steamboat Co., 23 How. 599. To same effect the Powhatan Steamboat Co. v. Appomattox R. R. Co., 24 How. 247. Under like circumstances the same ruling was made in Pennsylvania. Mohney v. Cook, 26 Pa. St. 342.

⁴¹ Carroll v. Staten Island R. R. Co., 58 N. Y. 126; s. c., 17 Amer. Rep. 221; same case before the Supreme Court, 65 Barb. 32. Approved in Wood v. Erie R. W. Co., 72 N. Y. 196, 200; s. c., 28 Amer. Rep. 125, and in Platz v. Cohoes, 82 N. Y. 219. In Ohio traveling on Sunday is not "sporting" within the statute prohibiting it on that day. Nogle v. Brown, 37 Ohio St. 7. In the case of a collision on the Sabbath the United States Admiralty Courts do not deny relief for the reason that the travelling was unlawful. The Gregory, 2 Benedict, 226. In Pennsylvania see Strickler v. Hough, 1 Pitts. 239; s. c., 3 Liv. L. Mag. 488. For another New York case, see Landers v. Staten Island R. R. Co., 13 Abb. Pr. (N. S.) 338.

⁴² White v. Lang, 128 Mass. 598; s. c., 35 Amer. Rep. 402.

⁴³ Schmid v. Humphrey, 48 Iowa, 652; s. c., 30 Amer. Rep. 414; 2 West Jur. 475.

⁴⁴ Piollet v. Summers, 24 Amer. L. Reg. 235; s. c., 15 W. N. C. 241.

⁴⁵ Sawyer v. Oakman, 7 Blatchf. 290; s. c., 1 Lowell, 134.

⁴⁶ Etchberry v. Levielle, 2 Hilton, 40. In this State the fact that the goods were obtained on Sunday by sale under fraudulent representations does not release the person perpetrating the fraud. O'Shea v. Kohn, 1 Amer. L. Jour. 298.

⁴⁷ Baldwin v. Barney, 12 R. I. 392; s. c., 34 Amer. Rep. 670.

⁴⁸ Tingle v. C. B. & Q. R. R. Co., 60 Iowa, 333.

⁴⁹ Sibila v. Bahmey, 34 Ohio St. 399; Tingle v. C. B. & Q. R. R. Co., *supra*.

DISQUALIFICATION OF JUROR BY REASON OF INTEREST.

CITY OF BOSTON v. BALDWIN.*

Supreme Judicial Court of Massachusetts, May 5, 1885.

JUROR. [Disqualification]. *Member of Common Council of Defendant Corporation.*—A member of the common council of Boston is not eligible as a juror in suits in which that city is a party, since the common council is a branch of the municipal government, and the municipal government has authority and control over all suits prosecuted by or against the city.

Thomas M. Babson, for plaintiff; W. E. L. Dillaway, for defendant.

MORTON, C. J., delivered the opinion of the court:

We understand the question intended to be raised by this bill of exceptions to be whether, the objection being seasonably made, it is competent for a member of the common council of the city of Boston to sit as a juror in a case in which the city is a party. At common law the fact that a juror is an inhabitant of a city or town which is a party to a suit is a sufficient cause of challenge. Blackstone says: "Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. A principal challenge is such where the cause assigned carries with it, *prima facie*, evident marks of suspicion either of malice or favor; as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation. All these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*." 3 Bl. Comm. 363.

Our statutes have changed the common-law rule by the provision that no juror shall be disqualified by reason of being an inhabitant of the city of Boston. Pub. St. c. 160, § 13. The purpose of the statute was to remedy the great inconvenience arising in Boston from the application of the rule that the minute pecuniary interest which an inhabitant has in the result of a suit by or against the city operates to disqualify him as a juror.

The juror in the case at bar was not disqualified merely because he was an inhabitant of Boston, but he occupied a position or relation towards the cause and the parties different from that occupied by the ordinary inhabitant. He was a member of the common council, a branch of the government of the city. The municipal government has authority and control over all suits brought or

prosecuted by or against the city. It represents the city, and is the guardian and protector of its rights. It was the duty of the juror in question, as a part of the government, to guard and protect the rights of the city. This relation to the city is inconsistent with his serving as a juror in the suit. It would not only create a suspicion of bias, but would naturally tend to create a bias or prejudice in favor of city. There can be no certainty that a juror thus situated can stand indifferently and impartially between the parties. The statute does not cover the case, and there is no necessity that members of the city government should act as jurors where the city is a party.

Exceptions overruled.

NOTE.—The rule of the common law which, as stated in the principal case, has been changed in Massachusetts by statute, was first declared by Lord Mansfield in *Hesketh v. Braddock*.¹ It was there held in an action by the treasurer of a municipal corporation for a breach of one of its by-laws, that the fact that the jury had been summoned by the sheriff, who was a freeman and citizen of the municipality, and that the members of the jury were themselves freemen and citizens thereof, afforded ground of challenge to the array and to the polls. Lord Mansfield laid down the rule that the minuteness of the interest did not do away with the objection; that degrees of influence cannot be measured, and that no line can be drawn save that of total exclusion of all degrees of interest whatever.² This decision was early followed in New York, where it was held that the fact that, in an action *qui tam*, a moiety of the penalty recovered would go to the poor of the town, afforded good ground for challenging such of the jurors as were inhabitants of the town.³ Since this decision it has been generally regarded as the established law in this country, where the rule has not been changed by statute, that the fact of being a taxpayer of the municipality against which the action is brought is a disqualification and a ground of challenge for cause, or of exclusion by the court of its own motion.⁴ This rule is changed, not only in Massachusetts, but also in many other States, by statutes which provide in various forms of expression that it shall not be a

¹ 3 Burr., 1847.

² See also and compare *Day v. Savadge*, Hob. 85; *Martin v. Reg.*, 12 Irish L. 399.

³ *Wood v. Stoddard*, 2 Johns. 194.

⁴ *Thomp. and M. Jur.*, § 179; *Garrison v. Portland*, 3 Oreg. 123; *Boston v. Tileston*, 11 Mass. 468; *Hawkes v. Kennebeck*, 7 Mass. 461; *Watson v. Tripp*, 11 R. I. 93; s. c., 15 Am. L. Reg. 282; *Alexandria v. Brockett*, 1 Cranch C. C. 507; *Diveny v. Almira*, 51 N. Y. 507; *Haves v. Gustin*, 2 Allen, 402; *State v. Williams*, 30 Mo. 484; *Dively v. Cedar Falls*, 21 Iowa, 565; *Cramer v. Burlington*, 42 Iowa, 315; *Davenport Gas Co. v. Davenport*, 13 Iowa, 229; *Gibson v. Wyandotte*, 20 Kan. 156; *Eberle v. St. Louis Public Schools*, 11 Mo. 247; *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Columbus v. Goetchius*, 7 Ga. 139; *Russell v. Hamilton*, 3 Ill. 56; *Bailey v. Trumbull*, 31 Conn. 581; *Hearn v. Greensburg*, 51 Ind. 119; *Johnson v. Americus*, 46 Ga. 80; *Rose v. St. Charles*, 49 Mo. 509; *Fulweiler v. St. Louis*, 61 Mo. 479. But *contra*, see *Middleton v. Ames*, 7 Vt. 166; *Omaha v. Olmstead*, 5 Neb. 446; s. c., 16 Am. L. Reg. 356; *Kemper v. Louisville*, 14 Bush, 87. The rule would not disqualify inhabitants of the county from sitting on the trial of a person charged criminally with burning the county jail, since the result of the trial would not affect the liability of taxpayers to contribute towards the rebuilding of it. *Phillips v. State*, 29 Ga. 105. So it was held that the

*S. c., 1 North Eastern Repr. 417.

ground of challenge that the officers who summoned the jurors, or the jurors themselves, are liable to pay taxes in a city, town or county which may be benefited by the recovery of a judgment in the suit.⁵ These statutes, it seems, are not liable to any constitutional objection.⁶

citizens of a county are not disqualified from sitting as jurors in a contest in respect of the title to a certain piece of property conveyed by a defaulting treasurer of the county to his sureties to save them from loss, because the county is no party to the suit. *Phipps v. Mansfield*, 62 Ga. 209.

⁵ N. Y. Code Remedial Justice, § 1179; 1 Bright *Purd.* (Penn.) Dig., p. 837, § 73; G. S. Mass. 1860, ch. 132, § 30; Gen. Stat. R. I. 1872, p. 434, § 32; Bush's Dig. Fla. ch. 104, § 25; R. S. So. Car. 1873, p. 53, § 27; Comp. L. Mich. 1871, § 6015; R. S. Me. 1871, ch. 82, § 76; Rev. N. J. 1877, p. 530, § 39; Comp. L. Mich. 1871, §§ 460, 3329; R. S. Ill. 1880, ch. 24, § 174; Id., ch. 139, § 47; Id., ch. 34, § 32; R. S. La. 1876, § 2134; Supp. to Ga. Code of 1873, § 409; R. S. W. Va. 1879, ch. 33, § 63; R. S. Wis. 1878, § 2850; Stat. at Large, Minn. 1873, p. 217, § 5; G. S. Neb. 1873, p. 232, § 5; R. S. Mo. 1879, § 2801; Comp. L. Kan. 1879, § 1391.

⁶ *Com. v. Reed*, 1 Gray, 472; *Com. v. Worcester*, 3 Pick. 462; *Com. v. Ryan*, 5 Mass. 90; *State v. Wells*, 46 Iowa, 662.

NEGLIGENCE AT RAILROAD CROSSINGS.

PENNSYLVANIA R. CO. v. HORST.

Supreme Court of Pennsylvania, Oct. 5, 1885.

NEGLIGENCE. [Railroad Crossing.] Horse of Traveler Frightened by Moving Brakes on Trains Standing at Crossings.—A railway train was standing at a highway crossing, divided so as to leave a space twenty-five feet wide for travelers to pass through, its cars occupying some of the highway. A traveler drove down with horse and wagon, and hesitated about crossing, but an employee of the company beckoned to him to come on. He drove quietly across and had reached the other side, when his horse, a gentle animal, took fright at a noise made by some of the trainmen in shifting the brakes. The horse started to run, the traveler drew the reins tightly to hold him back, when one of them parted, so that, in consequence of the strain on the other rein the horse was turned to one side, the wagon turned over an embankment, and the occupants thrown out and the plaintiff's wife injured. In an action against the railway company, it was held that there was evidence of negligence to go to the jury.

Error to the Common Pleas of Lancaster county.

This was an action by Samuel Horst against the railroad to recover damages for injuries to plaintiff's wife.

The plaintiff, with his wife and daughter, was driving to market along a much travelled turnpike which crosses the railroad at grade about a mile from the town of Lancaster. Arrived at the crossing, Horst found a freight train standing there which had been cut apart leaving a passageway of from twenty to twenty-five feet in width, less than half the width of the turnpike where it crosses the tracks. Plaintiff stopped his horse, when one of the train hands beckoned to him to

come on, which he accordingly did. The horse, a gentle one, went quietly over the crossing until, just as he passed the cars, a noise was made upon them, described by the plaintiff as a rattling noise like that caused by shifting the brakes. The horse started to run, and as plaintiff held him one of the reins parted where the round part joined the flat, and the pull on the remaining rein caused the horse to rush over to one side of the road and over a small embankment, where the wagon was upset, its occupants thrown out, and plaintiff's wife sustained serious injuries.

The jury rendered a verdict for the plaintiff with \$500 damages. From the judgment entered thereon the defendant company took this appeal.

H. M. & E. D. North, for plaintiff in error; *D. G. & B. Frank Eshleman*, for defendant in error.

GORDON, J., delivered the opinion of the court:

As there is no evidence that the plaintiff contributed in any degree to the accident which is the subject of this suit, the only matter which the case presents for consideration is, whether the evidence produced by the plaintiff justified the court in submitting to the jury the question of the defendant's negligence; that is, whether the proofs established any default on part of the railroad company's servants. If there were such proofs, we can see nothing in the exceptions on the part of the defendants which should induce us to reverse the court below; on the other hand, if the testimony fails to establish such negligence, the case ought not to have been submitted, except under instructions that the plaintiff could not recover. It does not matter that the proof of negligence may have been slight, if it exceeded a mere scintilla; for in that case it was properly sent to the jury, and the only remedy for the defendant was an application to the court below for a new trial. Under such circumstances we can grant no relief and the verdict must stand.

Was there, then, in this case, evidence that the accident complained of was produced by the company's default? We think there was. To start with, the train was in a bad and unlawful place. It had stopped on the crossing of a much frequented highway, and though before that crossing was reached by the plaintiff, the train was cut, leaving an opening of twenty or twenty-five feet, still it occupied one-half or two-thirds of the turnpike road, which, under the circumstances, it had no right to do. The public was entitled to the whole of the road, and the defendant could not lawfully subject the plaintiff to the risk he must run in the unusual appearance presented to his horse by the position of the cars; and had the accident happened from this disposition of the train, the company would have been unquestionably liable. Of course, we must be understood to speak with reference to the facts of the case in hand; that there may be occasions when a train may, for a reasonable time, occupy part or even the whole of a public crossing, cannot be gainsaid. We only say that such occupancy was not

justified by the circumstances here presented. Indeed, Horst says that he stopped and hesitated about passing the cut, until he was beckoned on by one of the train hands. Having been thus invited to pass, he had no reason to apprehend that anything would be done by the company's servants to alarm his horse. As he came up everything was quiet, and there was no good reason why it should be otherwise; and if some one of the employees chose, just at the critical moment when the horse was between the cars, to shift the brakes, and thus cause the rattling spoken of, the jury might well find that this was the immediate cause of the accident. Whilst a railroad company must be allowed the free use of all its rights, yet those rights must be exercised with due regard to the welfare and safety of others. *Pennsylvania R. Co. v. Barnett*, 9 P. F. Smith, 259. It not only has the right, but it is its duty to have the whistles of its locomotives blown upon all proper occasions, but not under a bridge over which a traveller is passing with his team. They have a right to blow off their engines through the mud valves, but not at a common crossing; they have a right to stop a locomotive, but not to the windward of a house in process of construction, and which may be burned by sparks issuing therefrom. *Turnpike Co. v. R. R. Co.*, 4 P. F. Smith, 345. All these things indicate negligence in the use of a right, and cannot be justified on the ground of the possession of such right, for it must also be used in a lawful manner.

In the present case, the right to screw up or release the car brakes is not denied, but whether this was done at a proper time and in a proper manner was a question of fact properly determinable by the jury. Negligence where there is evidence involving it is always for the jury, and in this case we cannot say there was no such evidence.

Judgment affirmed.

NOTE.—This case affords a somewhat unusual and peculiar instance of that most fruitful cause of litigation, casualties at railroad crossings. As stated by Gordon, J., it is unlawful to block crossings with trains. The company's right is to pass over, not to obstruct. *Murray v. Railroad*, 10 Rich. (S. C.) 227; *State v. Railroad*, 1 Dutcher (N. J.), 437; *State v. Grand Trunk R. Co.*, 59 Me. 189; *Patterson v. R. Co.*, 19 Am. & Eng. R. R. Cases, 415. The passer-by must on his part exercise proper care. *Chicago, etc. R. Co. v. Coss*, 73 Ill. 394; *Chicago, etc. R. Co. v. Sykes*, 96 Ill. 162; *Cahagan v. R. Co.*, 1 Allen, 187. The decisions analogous to the principal case may be examined somewhat in detail. In *Mahar v. R. Co.*, 19 Hun, 32, a train left a narrow opening at a street crossed by several tracks. A passer-by going cautiously over the crossing was struck by a car switched rapidly down another track. It was held that the crossing was obstructed, and that whether the injured man had been guilty of contributory negligence was for the jury to decide.

In a recent Michigan case, *Young v. R. Co.*, 19 Am. & Eng. R. R. Cases, 417, the plaintiff was injured by his horse taking fright at cars standing at a crossing. An opening at least sixteen feet wide had been made in

the train. The highway at that point was twenty feet wide, and the evidence was conflicting whether the whole crossing was left free. The court refused to say that the highway was not obstructed when sixteen feet of it were clear. What amounted to obstruction depended on the facts of the case and should be determined by the jury.

Another Michigan case, *Geoecke v. G. R. & I. R. Co.*, 24 N. W. Rep. 675, closely resembles the principal case. When plaintiff reached the crossing he found a train upon it. After waiting some time the train was backed clear of the crossing, the engine stopping at a point thirty-three feet from where the plaintiff crossed. The engine was letting off steam from the safety-valve, but plaintiff's team, accustomed to the railroad, did not mind this noise. But as the wagon was crossing the rails the cylinder cocks were opened, so the plaintiff testified, a sharp hissing sound made, and smoke and steam belched out, which frightened the team and occasioned the accident. It was held (1) that it was not negligence for the plaintiff to cross. (2) That there was no negligence of the defendant, unless there was an unnecessary opening of the cylinder valves. The defendants' right of way included a right to make the noises unavoidably incident to a railroad. (3) Whether the cylinder valves were opened, and if so, whether they were unnecessarily opened was for the jury.

In a very late case, *V. & M. R. Co. v. Alexander*, 62 Miss. 498, still another phase of the question is displayed. The train had been at the crossing an hour, the locomotive standing three feet and a half over the highway. The plaintiff waited twenty minutes for the train to move, then got down and led his horse across. The locomotive made no noise, but the horse took fright at the sight of it. It was held that the railroad company was liable as obstructing the highway, and that whether the plaintiff was guilty of contributing negligence was for the jury.

These cases agree with the text in holding that to go over a highway crossing where a train is standing is not *per se* negligent.

It is held, also, that what amounts to an obstruction of the highway depends upon the circumstances of the particular case.

The case last cited seems to rule that to delay upon any part of a crossing is an obstruction. It has been held, however, in Michigan, that the mere facts that a car projects a little over the highway, and that a quiet horse takes fright at it does not make the railroad company negligent. *Gilbert v. R. Co.*, 51 Mich. 488.

The cases show, finally, that as the use of crossings belongs both to railroads and passers-by, the right possessed by the former to make noises incident to railroads, must at crossings be exercised with appropriate care.

CHARLES CHAUNCEY SAVAGE.

Philadelphia, Pa.

STATUTE OF FRAUDS—ACCEPTANCE OF GOODS SOLD.

PAGE v. MORGAN.*

English Court of Appeal, 1885.

SALE OF PERSONAL PROPERTY. [*Statute of Frauds.*] *Acceptance which Takes Case out of Statute.*—Where goods of the value of £10 or upwards are sold by a verbal contract and delivered, and the purchaser retains them, and deals with them in such a

*S. C., 53 L. T. (N. S.) 126. Reported by P. B. Hutchins, Esq., Barrister-at-Law.

way as to prove that he admits the existence of a contract and admits that the goods were delivered under the contract, this is a sufficient acceptance to satisfy § 17 of the Statute of Frauds, although the purchaser afterwards rejects the goods on the ground that they are not equal to sample; and if the goods prove equal to sample the purchaser is liable. *Kibble v. Gough*, 38 L. T. Rep. N. S. 204, approved. Decision of Lord Coleridge, C. J., and Cave, J., affirmed.

The plaintiff brought this action to recover the price of certain wheat which he had agreed to sell to the defendant, or, in the alternative, damages for not accepting the wheat. There was no memorandum in writing of the contract of sale, but the plaintiff in pursuance of a verbal agreement, caused a number of sacks of wheat to be placed in barges and sent to the defendant's mill. The barges arrived in the evening, and on the following morning the defendant's servants raised some of the sacks from the barges into the mill. After several sacks had been brought into the mill the defendant's foreman arrived and examined the sacks which had been brought up, and stopped the delivery of the wheat on the ground that it was not equal to sample, and on this ground the defendant refused to accept it, and the wheat remained in the barges until after the commencement of the action, when it was sold by order of the court, and realized a sum which was less than the agreed price by £44. At the trial, which took place at the Chelmsford assizes, before Mr. Bulwer, Q. C., sitting as commissioner, the jury found that the wheat was equal to sample, and that the plaintiff had acted reasonably. As to the question whether there was a sufficient acceptance of the wheat by the defendant to render the contract of sale binding, the learned commissioner directed the jury that, if the sacks of wheat were placed in the defendant's mill, although he did nothing more than was necessary for the purpose of examining them, there was an acceptance. The jury found for the plaintiff for £44 in addition to the sum realized by the sale of the wheat. The defendant moved to enter judgment for him on the ground that there was no evidence of a sufficient acceptance of the wheat to satisfy the 17th section of the Statute of Frauds, or for a new trial on the ground of misdirection.

This motion was dismissed by Lord Coleridge, C. J. and Cave, J., and the defendant appealed.

Morton (Murphy, Q. C., with him), for the defendant, in support of the appeal.

There was no evidence of acceptance to satisfy section 17 of the Statute of Frauds, which ought to have been left to the jury, and therefore judgment ought to have been given for the defendant at the trial, and ought to be entered for him now. Even if there was some evidence for the jury, the direction was incorrect, and there ought to be a new trial. The direction was founded on the cases of *Morton v. Tibbett*, 15 Q. B. 428, and *Kibble v. Gough*, 38 L. T. Rep. N. S. 204, which were referred to at the trial; but, assuming those decisions to

be correct, they are distinguishable from the present case, having regard to the way in which the goods were dealt with. Here nothing was done which could amount to an acceptance of the wheat. The examination which was made was for the purpose of ascertaining whether the wheat was equal to sample in order that the defendant might decide whether he would accept it or not, and he decided not to accept. What was done may have amounted to a receipt of a part of the goods, but that is not sufficient, for the statute requires both receipt and acceptance. *Rickard v. Moore*, 38 L. T. Rep. N. S. 841, is a strong authority in favor of the defendant, and that case throws some doubt on the correctness of the decision in *Kibble v. Gough*, 38 L. T. Rep. N. S. 204.

Philbrick, Q. C., and R. Vaughan Williams, for the plaintiff, were not called on.

BRETT, M.R.—The law on the point raised in the present case is settled by the judgment of this court in *Kibble v. Gough*, 38 L. T. Rep. N. S. 204, which lays down the rule and principle as to evidence of acceptance of goods within the meaning of section 17 of the Statute of Frauds. In giving judgment in that case *Bramwell, L. J.*, said: "The first question is on the Statute of Frauds, was there part delivery, and did the defendant actually receive and accept part of these goods? . . . There was here no contract in writing. There is no doubt about the delivery of the first thirteen quarters; was there an acceptance of them? I will not say that the decision in *Morton v. Tibbett*, 15 Q. B. 428, was wrong; on the contrary, I think it was right. A man may accept goods without losing his right of objection to them; there must be such an acceptance to satisfy the statute as amounts to a recognition of the contract between the parties." In that case the goods were taken in by the buyer, and were dealt with for a short time, but were not kept for so long a time that the buyer would have had no power to reject them if they had proved not to be equal to sample. In a case where goods are delivered, and the buyer takes possession of them and deals with them, if he could not do so unless he had made a contract, and unless the goods had been delivered in fulfilment of that contract, there is evidence for the jury of an acceptance to satisfy the statute. The only question in the present case is whether there was evidence which would entitle the jury to find that there had been such an acceptance. The goods were sent to the defendant's mill in barges, and the next morning some of the sacks of wheat were taken up into the mill by the defendant's servants. A little later the defendant's foreman came and examined the wheat, which had been brought up. I cannot see how he could do that unless he knew that there was a contract, and that the wheat had been delivered in pursuance of the contract, and therefore I think the jury were entitled to say that he examined the wheat in order to ascertain whether it was equal to sample. How reasonable men could

come to any other conclusion except that the defendant admitted that there was a contract relating to wheat, and admitted that this particular wheat had been delivered to him in pursuance of this contract, and had examined it for the purpose of ascertaining whether it was equal to sample, I am unable to understand. No doubt there might be circumstances attending the delivery of goods which would not lead to a similar conclusion, as, for instance, if the person to whom the goods were delivered refused to allow them to remain on his premises or to have anything to do with them. In such a case, although there would be a delivery, there would be no acceptance. I rely not only on the delivery and the fact that the goods were in the defendant's warehouse, but on the fact that he examined them, and by doing so admitted that there was a contract. That is all that is necessary to justify the verdict of the jury. The case of *Kibble v. Gough* is a decision which is binding on this court, but I do not think that *Rickard v. Moore*, 38 L. T. Rep., N. S. 841, was decided under such circumstances as to be binding on us in the present case. For these reasons I am of opinion that there is no color for the suggestion that there was any misdirection at the trial, and that being so the decision of the Divisional Court was correct, and this appeal must be dismissed.

BAGGALLAY, L.J.—I am of the same opinion. In order to make this contract of sale binding under section 17 of the Statute of Frauds, it is necessary that "the buyer shall accept part of the goods so sold, and actually receive the same." The decisions in *Morton v. Tibbett* and *Kibble v. Gough* show that there may be an acceptance and receipt sufficient to satisfy the provisions of section 17, although the circumstances are not such as to preclude the purchaser from afterwards rejecting the goods on the ground that they are not equal to sample. It is true that there was some difference of opinion in the old cases as to what constituted a sufficient acceptance, but the question seems now to be settled, for *Kibble v. Gough* affirmed *Morton v. Tibbett* after that decision had stood for nearly twenty-eight years. In *Rickard v. Moore* there is a distinction as to the facts, and there is also this distinction, that the jury in that case found that the goods were not equal to sample. Here, and in the other two cases to which I have referred, the jury found the contrary. I have no doubt that there was evidence to go to the jury in the present case, and that their verdict was right.

BOWEN, L. J.—I am of the same opinion. I think the case is governed by *Kibble v. Gough*, which must be taken as the fountain of the law on this subject. We are bound by that decision, so it is unnecessary to express any opinion as to its correctness; but at the same time I cannot help saying that it seems to me to be founded on sound commercial common sense. An acceptance and receipt is the condition on which the validity of the contract depends, and one would expect that

the legislature would mean that it should amount to an acceptance where the buyer was dealing with the goods in such a way as to recognize the existence of the contract of sale, and the fact that the goods had been sent to him under it. That is the effect of the decision in *Kibble v. Gough* (*ubi sup.*). In *Rickard v. Moore* (*ubi sup.*), there was a distinction, as has been pointed out by the Master of the Rolls and Baggallay, L.J.; for in *Kibble v. Gough* the jury found that the goods were equal to sample, whereas in *Rickard v. Moore* it was found that the goods were not equal to sample, and therefore they were rightly rejected by the purchaser. The decision in that case as to the acceptance was merely on a secondary point, and I think that Bramwell, L. J., could not have meant to unsettle the law as laid down in *Kibble v. Gough*. Even if this were so, I am of opinion that, having the two cases in the Court of Appeal before us, we ought to go back to *Kibble v. Gough*, and follow that decision.

Appeal dismissed.

NOTE.—The doctrine enunciated in the principal case—that in order to manifest an acceptance within the meaning of the statute, the buyer must so deal with the goods as to prove that he recognizes the existence and obligation of the contract—together with the cognate rule that the property must pass entirely beyond the dominion and control of the seller, runs through all the reported decisions and forms the basis of the whole law on this subject. Thus it is universally held that there must be both a delivery by the vendor and an acceptance by the vendee; that the one without the other will not satisfy the requirements of the statute.¹ And first, as to delivery, it is essential that the possession and control of the property should be completely transferred to the purchaser; if the vendor retains his lien on it for the purchase-money, it cannot be so delivered as to take the case out of the statute.² But the fact that the vendor remains in possession of the goods under an agreement with the vendee to sell them for him will not make the sale void.³ The delivery may be symbolical, *e. g.*, a delivery of the key of the warehouse in which the goods are stored;⁴ or where it would be extremely difficult to collect all the articles in one place;⁵ or where they are of great weight and bulk.⁶ It is not necessary that the delivery and acceptance should be contemporaneous with the making of the contract; it is sufficient if they take place within a reasonable time.⁷ But to constitute a sufficient delivery and acceptance, something more than mere words is requisite;⁸ and no promise or declaration of the buyer that he will take the goods (then left for him at another place), at a future day, will amount to an acceptance.⁹

¹ *Stone v. Browning*, 51 N. Y. 211; *Caulkins v. Hellman*, 47 N. Y. 449; *Maxwell v. Brown*, 39 Me. 98; *Edwards v. Railway*, 48 Me. 379; *Gilman v. Hill*, 26 N. H. 311.

² *Gardet v. Belknap*, 1 Cal. 339; *Clark v. Labreche*, 20 Reporter, 436; *Marsh v. Rouse*, 44 N. Y. 643; *Sufford v. McDonough*, 120 Mass. 290.

³ *Godechaux v. Mulford*, 26 Cal. 316.

⁴ *Wilkes v. Ferris*, 5 Johns. 335.

⁵ *Boynston v. Venzie*, 24 Me. 236.

⁶ *Calkins v. Lockwood*, 17 Conn. 154.

⁷ *McKnight v. Dunlop*, 5 N. Y. 587.

⁸ *Shindler v. Houston*, 1 Conn. 361.

⁹ *Shepard v. Passey*, 53 N. H. 4.

Next, as to acceptance, it is necessary to show some act on the part of the vendee plainly acknowledging the existence of the contract and that the goods are received pursuant thereto. Thus where goods are sold by sample, it is not enough to prove that they came into the possession of the vendee and that they corresponded to sample; for he might receive them without accepting them, and they might be such as the contract called for and yet be rejected by the purchaser.¹⁰ But any unequivocal act, on the part of the buyer, amounting to an assertion of ownership of the property, will suffice to take the sale out of the statute.¹¹ In an interesting English case it appeared that a complete verbal bargain had been made for the sale of a horse, but no actual delivery; that the vendor then asked the purchaser to lend him the horse for a short time; that the vendee assented, and the vendor kept the horse for two weeks and then sent him to the purchaser, who refused to receive him; and it was held that, as the purchaser had assumed the ownership of the horse in making a loan of him, there was a sufficient delivery and acceptance.¹² But the seizure of the goods, under legal process, as the property of the vendee, is not sufficient to satisfy the statute.¹³ There is much conflict of authority as to whether the acceptance must be absolute and final, so as to preclude the buyer from afterwards objecting to the quantity or quality of the goods, or the reverse. The principal case and *Morton v. Tibbett*, cited by court and counsel, seem to establish the rule that there may be a sufficient acceptance by the purchaser without any waiver of his right to reject the goods for inferiority or deficiency. And there are many cases agreeing with these decisions.¹⁴ But on the other hand it has been frequently held that the mere receipt of the goods by the vendee and his examination of them for the purpose of ascertaining their quantity and quality will not amount to a sufficient acceptance; that he must accept them finally and unconditionally.¹⁵ It is not always necessary that the goods should leave the shop or warehouse of the seller.¹⁶ But an acceptance is not proved by showing a deposit of the articles in the public highway at a point designated by the purchaser, and a notification to him of the fact that they were so deposited;¹⁷ nor by the fact of the vendor's sending the article in an incomplete condition to a place designated by the vendee for the delivery of the perfect article.¹⁸

It is well settled that the delivery and acceptance of a substantial part of the goods sold will satisfy the requirements of the statute.¹⁹ But evidence of delivery

and acceptance of a less amount of similar goods is not sufficient without proof that they were delivered and received as a part of the goods sold.²⁰

The acceptance need not be the personal act of the vendee; it may be made for him by any duly authorized agent.²¹ And a delivery to one of several joint purchasers, and acceptance by him, renders the contract valid as to all.²² As to the effect of delivery to a carrier there has been much indecision. It has been held that if the goods were delivered to a carrier selected and named by the purchaser, and accepted by him, this would constitute a sufficient receipt and acceptance under the statute.²³ But the better opinion undoubtedly is, that, while a delivery of the goods to a carrier, pursuant to the directions of the purchaser, will fulfill the duty of the vendor and amount to a sufficient delivery, yet it cannot be construed into an acceptance of them by the vendee.²⁴ In other words, if the contract itself were valid, such a delivery would be sufficient to transfer the title to the purchaser, but it is not sufficient to consummate a sale otherwise void under the statute.

The question of acceptance is one of fact, and it is for the jury to decide whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute.²⁵

H. C. BLACK.

²⁰ *Davis v. Eastman*, 1 Allen, 422.

²¹ *Snow v. Warner*, 10 Met. 132. But see *Quintard v. Bacon*, 99 Mass. 185.

²² *Smith v. Milliken*, 7 Lans. 336.

²³ *Hart v. Sattler*, 3 Camp. 528; *Spencer v. Hale*, 30 Vt. 314.

²⁴ *Denmead v. Glass*, 30 Ga. 637; *Wilcox S. P. Co. v. Green*, 72 N. Y. 17; *Rodgers v. Phillips*, 40 N. Y. 519; *Atherton v. Newhall*, 123 Mass. 141; *Lloyd v. Wright*, 25 Ga. 215.

²⁵ *Garfield v. Paris*, 96 U. S. 537.

WEEKLY DIGEST OF RECENT CASES.

COLORADO,	2, 8, 9
KANSAS,	14
MAINE,	12
MASSACHUSETTS,	4, 7
NEW JERSEY,	1, 13
NEW YORK,	3, 6, 11, 15
PENNSYLVANIA,	10
VIRGINIA,	5.

1. CONSPIRACY. [Indictment.] *Must Charge that the Combination was Corrupt.*—To constitute a combination a conspiracy, it must be corrupt. An indictment against members of a board of chosen freeholders for combining to vote a sum of money out of the county funds to a third person, but which did not charge that the confederation was corrupt, or that the third person was to the knowledge of the defendants disintituled to the money, is bad. [Citing *People v. Powell*, 63 N. Y. 88.] *State, Wood et al. prosecutors v. State*, S. C. N. J., Nov. 5, 1885; 1 Atl. Reporter, 509.

2. CONSTITUTIONAL LAW. [Judicial Power.]—*Act Authorizing Entry of Judgment by Confession by Clerk of Court.*—The act of the legislature authorizing clerks of the circuit courts to enter up judgments by confession is not unconstitutional. In the opinion of the court by Thayer, J., it is said: "It is contended upon the part of the appellants that the entry of judgment by default or up-

¹⁰ *Remick v. Sandford*, 120 Mass. 309; *Stone v. Brown*, 68 N. Y. 598.

¹¹ *Vincent v. Germond*, 11 Johns. 283; *Marshall v. Ferguson*, 23 Cal. 65.

¹² *Marvin v. Wallace*, 6 El. & B. 726. An American case, on a similar state of facts, holds an exactly opposite view: *Phillips v. Hunnewell*, 4 Greenl. 376.

¹³ *Hicks v. Cleveland*, 48 N. Y. 84; *Washington Ice Co. v. Webster*, 62 Me. 341.

¹⁴ *Currie v. Anderson*, 2 El. & El. 598; *Cusack v. Robinson*, 1 B. & S. 299; *McMaster v. Gordon*, 20 U. C. C. P. 16; *Strong v. Dodds*, 47 Vt. 358; *Smith v. Stoller*, 26 Wis. 671.

¹⁵ *Hewes v. Jordan*, 39 Md. 472; *Stone v. Browning*, 68 N. Y. 598; *Lloyd v. Wright*, 25 Ga. 215; *Hausman v. Nye*, 62 Ind. 491. And *Morton v. Tibbett* has been severely criticised in the exchequer. *Hunt v. Hecht*, 8 Ex. 814; *Coombs v. R. R. & N. 510*; *Castle v. Swarder*, 6 Id. 832.

¹⁶ *Exp. Safford*, 3 Lowell, 453. See *Knight v. Mann*, 120 Mass. 219.

¹⁷ *Finney v. Apgar*, 31 N. J. L. 366.

¹⁸ *Brewster v. Taylor*, 63 N. Y. 587.

¹⁹ *Van Woert v. Railroad*, 67 N. Y. 533; *Atwood v. Lucas*, 53 Me. 508; *Davis v. Moore*, 13 Me. 494; *Gault v. Brown*, 48 N. H. 163; *Townsend v. Hargraves*, 118 Mass. 325.

on confession involves the exercise of judicial power, and that, as all judicial power in this State is required to be vested in certain courts, the legislature had no authority to confer any such power upon the clerk. The decisions of other courts under similar provisions of statute and organic restrictions are conflicting. The point of difference between them is a disagreement as to whether such entry is a judicial or ministerial act. If I were required to decide the abstract question, I should be very much inclined to hold that the rendition of judgment in all cases was a judicial act. The mere entry of judgment, no doubt, is a ministerial act; but it seems to me that before such entry can be made there must be an adjudication, either that the facts committed, or the confession and statement in the particular case, entitle the party to a judgment. Our statute upon the subject has been in force for nearly twenty years. It may be said to have been acquiesced in by the bar, and it has tacitly been upheld by the courts. It has become a rule or practice, and, if pronounced invalid now, would cause disturbance in property rights and occasion great mischief. When an act of the legislature has been so long recognized as binding, and important affairs of the community, affecting individual rights, been transacted in accordance with its provisions, it should not be disturbed unless it plainly and unequivocally conflicts with the organic law. An act which has been sanctioned by the community ought not to be declared unconstitutional by the courts when the question is in any degree doubtful. Whatever, therefore, my own private notions upon the subject are, so long as I am not positively certain of their correctness, I feel constrained to hold that such judgments are valid." Waldo, C. J. dissented. *Crawford v. Beard*, S. C. Colo., Nov. 9, 1885; 8 Pac. Repr. 587.

3. —. [Retirement of Judges and Justices].—*Surrogate in New York not a Judge or Justice, etc.*—The provision of § 13 of article 6 of the Constitution of New York, to the effect that no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age, does not apply to persons holding the office of surrogate. [The court reasoned that in interpreting constitutions regard must be paid to the popular sense in which words are generally used, and that legislative action closely following the adoption of a provision of the Constitution, and related thereto, is entitled to great consideration by courts in construing the provision.] *People ex rel. etc. v. Carr*, N. Y. Ct. of App., Oct. 27, 1885; 2 East Repr. 659.

4. CONTRACT. [Estoppel by Fact of Signing.] *Signing without Intending to be Bound.*—In the absence of fraud or imposition, one who enters into a contract is conclusively presumed to understand the terms and the legal effect of it, and to assent to them. [Citing *Rice v. Dwight Man. Co.*, 2 Cush. 80]. Accordingly it is no defense to an action on a note that the maker testifies that she signed the notes "not thinking of such a thing as binding herself upon the note," unless she was induced so to believe by the fraud of the plaintiff or his agent. *Jackson v. Olney*, S. C. Mass. Oct. 24, 1885; 2 East. Repr. 712.

5. DOWER—*Money set Apart in Lieu of, is Realty.*—In a suit for that purpose, lands of D. are sold for partition, one-third of the proceeds being set apart for widow's dower; A., a daughter of D.,

who was *sui juris*, and a party to the suit, subsequently intermarried with T., and died during life of widow of D., never having had issue; after death of widow, T. sued to recover the share of A., his deceased wife, in the dower fund, claiming it as personalty. Held: The dower fund is realty, and A.'s share passes to her next of kin; T., her surviving husband, has no interest therein. *Turner v. Turner*, Va. S. C. of App., Oct. 8, 1885; 9 Va. L. J. 728.

6. DURESS. [Per Minas].—*Threat to Sue and Imprison not Duress.*—A threat to sue defendant, and to arrest and imprison him, is not such duress as will avoid a promise induced by such threat. [Citing 1 Pars. Cont. (5th ed.); *Shepard v. Watrous*, 3 Caines, 196; *Farmer v. Walter*, 2 Edw. Ch. 601; *Knapp v. Hyde*, 60 Barb. 80.] *Dunham v. Griswold*, N. Y. Ct. of App., Oct. 27, 1885; 2 East Repr. 674.

7. EASEMENT. [Non-User-Abandonment-Evidence].—*Non-User for More than Twenty Years how far Evidence of Abandonment.*—While a mere non-user of an easement, even for more than twenty years, will not be conclusive evidence of abandonment, such non-user, united with an adverse use of the servient estate, inconsistent with the existence of the easement, will extinguish it. [Citing *Jennison v. Walker*, 11 Gray, 423; *Owen v. Field*, 102 Mass. 90; *Barnes v. Lloyd*, 112 id. 224; *Chandler v. Jamaica Pond Aqueduct*, 125 id. 544.] *Smith v. Langevald*, S. C. Mass., Oct. 24, 1885; 2 East. Repr. 718.

8. EMINENT DOMAIN. [Abandonment].—*Right to Abandon the Condemnation Proceedings.*—Under the statute (section 242), the right or privilege to abandon proceedings to condemn land on payment of costs and accrued damages is lost whenever the land-owner acquires a vested right to the compensation awarded. The land-owner's interest in the award made cannot be said to be vested until the payment or deposit in the manner provided by law of the sum awarded. [Citing on this point *Stacey v. Vermont Cent. R. Co.*, 27 Vt. 39, and cases there cited; *Peoria & R. I. R. Co. v. Rice*, 75 Ill. 329; *Norris v. Mayor, etc.*, 44 Md. 598; *Graff v. Mayor of Baltimore*, 10 Md. 544.] Proceedings to condemn land are special proceedings, differing widely from those of an ordinary civil action, governed by dissimilar rules of pleading and practice; and abandonment in one is not analogous to nonsuit in the other. [Pollard v. Moore, 51 N. H. 188, followed.] An appeal from the award, and the overruling of a motion to set the same aside, does not deprive the party seeking to condemn the land from abandoning the proceeding, even after decision of Supreme Court. [Denver & N. O. R. Co. v. Jackson, 6 Colo. 340, explained and limited.] Where a railroad seeks to condemn lands for depot, engine-house and machine-shops, and right of way, it may, after the award, abandon the proceedings as to all except the right of way, if it choose so to do; but in that case there will have to be a new award of damages resulting from the right of way alone. In a note to this case the learned editor of the *Pacific Reporter* adds: "It was held by Judge Deady, in the case of *United States v. Oregon Ry. & Nav. Co.*, 16 Fed. Rep. 524, that where the United States has instituted proceedings to condemn lands for public improvements, after the award of damages has been made, the plaintiff can elect to pay the award or abandon the proceedings. But it is said by the Supreme

Court of Nebraska in the case of *Drath v. Burlington, etc. R. Co.*, 18 N. W. Rep. 717; s. c., 15 Neb. 367, that after an award by the commissioners, and a judgment by the court, a railroad company cannot abandon the condemnation proceedings, disclaim the title, and void the judgment." *Crawford v. Beard*, S. C. Colo., Nov. 9, 1885; 8 Pac. Repr. 537.

9. **INDICTMENT.** [*Conclusion in Name of State—Where Crime was Committed before the Admission of the State into the Union.*—That an indictment for a crime committed before the admission of the Territory as a State concludes that such crime was committed "against the peace and dignity of the people of the State of Colorado," will not affect its validity. *Packer v. People*, S. C. Colo., October Term, 1885; 8 Pac. Repr. 564.

10. **INSURANCE, FIRE.** [*Waiver of Condition of Policy.*—*Waiver of Condition Requiring Actual Payment before Liability by a Course of Dealing.*—The condition of a policy of fire insurance exempting the insurance company from loss until after the money is actually paid into the treasury of such company, or to an agent authorized in writing to receive the same, may be waived by the methods of the company in dealing with a particular agent or agents. Where an agent, who is authorized to countersign policies and receive premiums, employs an insurance broker in another city with the knowledge of the company, to place insurance in that city for him, and the company he represents, issuing policies of insurance properly countersigned for all risks so placed, which he sends to such broker to deliver on payment of the premium, and such broker duly sends a check to such agent, which is not received by the latter until after a loss on the risk, the company is equitably estopped to set up that the premium had not been received by it as stipulated for in the policy of insurance. [Distinguishing *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.] *Universal Fire Ins. Co. v. Block*, S. C. Pa., Oct. 5, 1885; 1 Atl. Repr. 523.

11. **INTERPRETATION.** [*Certificate of Deposit—Statute of Limitations.*—*Instrument held a Certificate of Deposit and not Subject to Limitation until Demand.*—Where money is placed on deposit, no indebtedness arises, and no action can be maintained therefor, until after a demand. In such case the statute of limitations does not begin to run until demand is made. Plaintiff brought an action on the following instrument, to which defendant interposed the statute of limitations:

"PHILADELPHIA, May 21, 1864.

"Due S. K. Ashton, M.D., trustee, \$4,000, returnable on demand. It is understood this sum is especially deposited with us, and is distinct from the other transactions with said Ashton.

"J. R. & H. B. FRY."

Held, that the instrument was a certificate of deposit, and that the statute of limitations did not begin to run thereon until demand was made. *Smiley v. Fry*, N. Y. Ct. of App., Oct. 30, 1885; 2 East. Repr. 608.

12. **LAND.** [*Horizontal Division of.*—*Title to Second Story of School House built by Private Persons by Authorization of District.*—Certain persons were permitted to build a public hall as a second story of a new school-house, and, after completion, an agent, authorized by the school district, leased the second story to such persons

with necessary easements of ingress and egress, and with equitable provisions in regard to keeping the building in repair, etc., "so long as the building shall stand;" the building in its several parts was occupied in accordance with the agreement for nearly thirty years, when the district voted "to sell the school-house and lot under" the hall, and their agent did convey all their interest in the land and building therein. In a real action by the grantee against the occupants of the hall, held: 1. That the title to the hall was never in the district; it inured to the builders before the execution of the instrument called a lease, by virtue of their having built it under a license from the district and the purpose of the paper was to regulate the use and give the easement. 3. That the vote to sell did not authorize a conveyance of the hall, and the deed could go no further than the authority. 3. The defendants having disclaimed all except the second story with its easements, that they, being in possession, have at least a color of title, which is sufficient, as the plaintiff has failed to show a better one. *Peaks v. Blethen*, S. C. of Me., Nov. 16, 1885; 2 East. Repr. 684.

13. **QUO WARRANTO.** [*Possession and User.*—*Not Issued against one not in Possession of the Franchise.*—A *quo warranto* information is the proper remedy to try the title to an office; but an incumbent cannot use it against one who has not been in the actual possession and user of the franchise. [In the opinion of the court by Scudder, J. it is said: "There must be an user, as well as a claim of a franchise, to found an application for an information in nature of a *quo warranto*. *King v. Whitwell*, 5 Term R. 84; *Updegraff v. Crans*, 47 Pa. St. 103. He may await the attack of his adversary by *quo warranto* information, but cannot anticipate him by disputing his title to office in proceedings to which he is not made a party. Collateral questions affecting the right to an office may be sometimes raised either by *certiorari* or *mandamus*, in testing the validity of laws, or the ordinances and resolutions of municipal bodies; as in *O'Donnel v. Dushman*, 39 N. J. Law, 677; *Trowbridge v. Newark*, 46 N. J. Law, 140; *Fitzgerald v. New Brunswick*, ante, 496, at the present term; and many other reported cases; but the title to offices held under such laws, ordinances, or resolutions cannot be definitely determined in these proceedings to which one of the claimants is not made a party. Where the purpose of the writ, as it appears in this case, is to forestall the opinion of the court, if *quo warranto* information should be thereafter used, and to act directly on the election of a claimant to office who is not made a party, it should be dismissed, with costs, and that will be the order of the court."] *State, ex rel., etc. v. Chosen Freeholders*, S. C. N. J., Nov. 20, 1885; 1 Atl. Repr. 515.

14. **RAILWAY COMPANY.** [*Negligence—Respondent Superior.*—*Not Liable for Negligence of Another Company whose Bonds it has Guaranteed.*—Where a great railroad company, operating a long line of road in the State, aids, as stockholder or bondholder, or as the guarantor of bonds, another railroad company in constructing its road, under the provisions of chapter 103, Laws 1873, such auxiliary company does not become, on account of such aid, the servant or agent of the parent company; and the parent company is not, on account of being such stockholder or bondholder, or guarantor of bonds, responsible for the negligence or other default of the auxiliary company in constructing its

road in its own name. [The court (opinion by Horton, J.) after distinguishing *Bridge Co. v. Wooley*, 78 Ky. 523, said: "In our former opinion we assumed the general doctrine that one railroad company might be the servant or agent of another, to have application in this case. This declaration we now correct, as this principle has no application in this case, upon the facts disclosed upon the trial. Where a parent company, operating a long line of road in the State, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line, in the name of another company, and, in strictly pursuing the provisions of the statute, merely furnishes aid as a stockholder or bondholder, or a guarantor of bonds, to the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent, in such construction of its road, of the parent company; and the parent company is not, on account of being a stockholder or bondholder, or guarantor of bonds, of the auxiliary company, responsible for the negligence or other default of the auxiliary company, in constructing its road in its own name. The syllabus of the former opinion will accordingly be qualified."] *Atchison, etc., R. Co. v. Davis*, S. C. Kan., Dec. 1, 1885; 8 Pac. Repr. 530.

15. **TAXATION.** [Assessment.]—*Personalty of Lunatic, at what Place Assessed.*—The personal estate of a lunatic should be assessed to the lunatic in the place where he resides and not to the committee appointed to take charge of his estate. *People, ex rel. etc. v. Commissioners*, N. Y. Ct. of App., Oct. 27, 1885; 2 East. Repr. 647.

CORRESPONDENCE.

TOUTERS AND SHYSTERS IN CHICAGO.

To the Editor of the Central Law Journal:

Noticing the shyster legal advertisement in a late number of the JOURNAL with your comments thereon, it occurred to me that you might be interested in the enclosed slip cut from a Chicago daily:

PROFESSIONAL CARDS.

M. S. ROBINSON, LAWYER, 95 5TH-AV., CHICAGO—Practices in all courts; author of a book giving the divorce laws of all States; where and how legal divorces are obtained; price \$2.

CO-OPERATIVE LAW AND COLLECTION AGENCY—Collections made throughout the United States; wages collected; legal advice free; all business legally transacted. 18 W. Madison st., R. 6.

A. GOODRICH, ATTORNEY AT-LAW, 124 DEARBORN A. st., Chicago—Advice free; 18 years' experience; business quietly and legally transacted.

LEGAL ADVICE FREE—UPON RECEIPT OF TWO stamps will send pamphlet containing divorce law of Illinois. **CORSELL & SPENCER**, 164 and 166 Randolph.

LEGAL ADVICE FREE—NO PAY UNLESS SUCCESSFUL; in all courts. 91 Washington st., Room 6.

LABORERS' WAGES AND BAD DEBTS OF ALL KINDS collected. 46 and 48 S. Clark st., Room 3.

L. L. MARCHAND, EXPERT ACCOUNTANT, 110 G. CLARK st., Room 521; best references.

PUT THIS OUT—LABORERS' WAGES AND BAD Debts of all kinds collected. 70 LaSalle st., R. 7.

This is no new thing, however. The same or its equivalent might have been found in almost any Chicago paper for several years last past. The advertisers are a choice lot. There is possibly one man in the list who does a legitimate business—Mr. Marchand

the accountant; the others are divorce shysters and legal vermin of the worst type. The man Goodrich has been disbarred, but still continues to flaunt his name before the public as an "Atty. at Law." The notices, while shrewdly worded, bristle with covert rascality. They are smart enough not to try to do all that they advertise, but are also smart enough to fleece every one who falls into their hands, as they deal with persons who are ignorant of law and for the most part of small means. Is it not a disgrace to our laws that these fellows cannot be reached by legal process and punished? Yours respectfully,

Kewanee, Ill.

JAS. K. BLISH.

[The advertisement of Mr. Marchand seems to be entirely proper. A person practicing an exceptional profession like that of an expert accountant, would have no other convenient way of making a tender of his services to the legal profession and the public. Though he is in very bad company, we are sure that the maxim *nosctur a sociis* does not apply to him. His companions are indeed a questionable lot. The bar association of Illinois is about to meet, and they could not do better than to instruct their grievance committee to take hold of this matter and institute prosecutions, if the state of the law is such that they can do it with a reasonable prospect of success. Ed. C. L. J.]

HOW A WISE MAN BUILT HIS HOUSE.

To the Editor of the Central Law Journal:

I have been greatly amused at reading the opinions of your advisers as the same are published in your now very valuable JOURNAL. It reminds me of the story of the gentleman who wished to build for himself a nice mansion, and, of course, was exceedingly anxious to have the approbation of his friends and neighbors. So he asked the advice of all. The first said, "Here is a nice site, and I should build such a style of house." The second said, "I don't like that site nor the style of house." The third came along and was utterly amazed at the selection of the site made by the others, and of their total want of taste in architecture. He said, "Leave off all that; here is the most charming spot for a house, and here is the most exquisite plan for a house." And so it went on until the gentleman became disgusted with his advisers, and went and selected his own site and adopted his own style of architecture, and builded a house to suit himself. Moral: Well, you know the rest. Run your JOURNAL to suit your own taste, not expecting that every article in every number will strike the fancy of every subscriber. At one time I had three or four law journals regularly laid on my table, but have discarded all but the CENTRAL LAW JOURNAL, which comes to me weekly like a ray of sunlight to which I always turn with pleasure.

I am now past seventy years of age, am living on borrowed time; have read many books, including the Bible, and never found one free from objection and never expect to. So "lay on, Macduff." My old mother taught me when a child that when I sat down to a meal I should select what I liked and eat it, laying the other aside without scolding at the cook; and I apply the same rule to books. If I should determine that the CENTRAL is not worth the subscription price, I will advise you by discontinuance.

Monmouth, Ill.

JAS. W. DAVIDSON.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

40. CHECK DRAWN TO B. OR ORDER.—A. is a depositor in a bank; he has funds there to meet a check drawn to B. or order. B. presents the check in person at the bank, and they refuse to pay the same unless B. indorses it. Can B. be made to indorse? We claim not, but the cashier of our bank claims he will not pay it unless check is indorsed. B.

Unionville, Mo.

41. ARKANSAS EXEMPTION LAW — PRIVILEGED DEBTS—UNPAID PURCHASE MONEY.—Section 4398 of Mansfield's Digest of the laws of Arkansas provides that in any action brought in the courts of this State for the recovery of money contracted for property in possession of the vendee, it shall not be lawful to include said property in any schedule intended to protect said property, or exempt it from seizure on attachment or sale on execution or other process for the collection of the debt, etc. And the following section provides for the mode of enforcing such vendor's lien on the property. Suppose the vendee dies. Can the lien be enforced against his personal representative; i. e., can property in possession of such representative be said to be "in possession of the vendee" within the meaning of the above statute? T. D. C.

42. REPLEVY BY WIFE OF HER HOUSEHOLD GOODS FROM HER HUSBAND.—The laws of Indiana as they now exist permit a married woman to own and hold personal property in her own right and to sell the same without the consent of her husband; she may sue and be sued. Under this condition of things, can the wife, during the existence of the marriage bonds, withdraw at her own pleasure and replevy from her husband the household goods she holds as her separate property, but which she permitted to be used as among the necessary paraphernalia for keeping house, unless she, at least, first shows cause for so doing? J. S. B. Plymouth, Ind.

43. THE DOCTRINE OF TRANSFERRED MALICE.—A. purposely and maliciously attempts to kill B. by shooting him with a pistol, but misses his mark and kills C., an innocent party against whom A. has no malice nor ill will. Are there any modern decisions that would reduce this case from murder to manslaughter? If so, cite them? Or is it not a case of murder? Cite authorities. PROSECUTOR.

44. WHETHER A STATE IS ESTOPPED BY REASON OF HANGING A MATERIAL WITNESS.—A. and B. are indicted, tried and convicted for the murder of C.; and are sentenced to be hung. At the trial of B., A. is an important and material witness against B. B. obtains a new trial, and before his second trial comes off, A. is hung in pursuance of the judgment of the court. At B's second trial can A's testimony given on B's first trial be used? By hanging A. when it could have procured a respite for him until after B's second trial, has not the State or government estopped itself from insisting on using A's testimony, by depriving the accused of his right to meet the witnesses face to face at the trial? X. Y. Z.

*Several queries are unavoidably left over for future insertion.

QUERIES ANSWERED.

Query No. 31. [21 Cent. L. J. 394.] A. B. and C. join in the execution of an instrument in the following language: "We authorize D. to sell and convey any real estate in which we now are or may hereafter become jointly interested." Thereafter A. dies. Will a deed by D. under such authority—purporting to convey the entire estate to one ignorant of A's death, operate to pass the interest of B. and C? K.

Answer.—The authority of the agent determines by the death of the principal; and the joint authority to two persons terminates by the death of one of them. The rule does not go so far as to terminate the authority given by all, by the death of one of several principals. 2 Kent Com., 646; Whart. Agency, § 106. In cases of joint tenancy, where there is a right by survivor, a deed executed under power of attorney, after death of one of the joint tenants, will be operative by way of estoppel upon the after-acquired interest of the survivors. Wilson v. Stewart, 6 Am. Law Reg. 372; s. c., 5 Pa. L. J. R. 450; see also Bank v. VanDerhorst, 32 N. Y. 553. DEDIMUS POTESTATEM.

Query No. 33. [21 Cent. L. J. 417.] JOINT TENANCY AND SURVIVORSHIP IN MISSOURI.—In adopting the common law into this State the statute also declared that the doctrine of survivorship in leases of joint tenants, shall never be allowed in this territory. July 20, 1820. Law passed regulating joint tenancy and tenants in common in February, 1825. And when was the law passed adopting survivorship in joint tenants in this State? DANIEL ZOOK. Oregon, Mo.

Answer.—By the second section of the territorial laws of Missouri adopting the common law, approved January 19, 1816 (Territorial Laws, Vol. 1, p. 436), the doctrine of survivorship in joint tenants was not allowed in the Territory. This second section was never adopted after Missouri was admitted as a State; but, by the third section of the act entitled "Conveyances" (Laws of 1825, p. 216), no estate shall be held in joint tenancy, unless expressly declared so to pass. This section has been re-enacted ever since in every revision, and is now the law. Hence all the incidents of a joint tenancy, including survivorship, will pass by a deed, when it is expressly stated therein that the estate is to be held in joint tenancy, and not in tenancy in common. See as to incidents of joint tenancy, 4 Kent Com. 360; R. S. Mo. 1879, § 3949. S.

Query No. 34. [21 Cent. L. J., 418.] In a written application by A. to become a member of a Mutual Benefit Life Insurance Company, he directs that his benefit be paid to his wife and children, naming them. The Insurance Company issues policy, payable by its terms to the wife alone, omitting any mention of the children. A. accepts the policy, knowing that it is payable to the wife only—pays all assessments and dies while in good standing. Can the Insurance company, on the ground that other beneficiaries were designated in the application, avoid paying the entire benefit to the wife? Have the children any interest in the claim, and if so, what is their remedy? W. L. M.

Answer.—Whatever might have been the intention in respect to beneficiaries when application was made, it does not appear that any mistake existed when the insurance was consummated by the delivery and acceptance of the policy, and the beneficiary named therein is alone entitled to sue. Bliss Life Ins., § 317, et seq. SCIRE FACIAS.

Query No. 39. [21 Cent. L. J. 444.] A. makes a note to B., reading, "On or before January 1st A. D. 1886, I promise to pay," etc., note bearing ten per cent interest. Can A. tender to B. the principal and amount of interest up to date of tender before maturity and be discharged?" **ARKANSAS.**

Answer.—The only object or benefit in making a note to read "on or before," &c., is that the maker may have the privilege of paying at any time before the day named, and thus avoid accumulation of interest. He is not compelled to pay before the day named, and suit cannot be instituted upon the note before that time. A lawful tender of the principal and accrued interest, at any time after execution of the note will bar interest and costs after that time. Such notes are negotiable, and not obnoxious to the objection that there is no fixed time for payment. See *Brent v. Terner, et al.*, 4 Arkansas, 160; *Jordan v. Tate*, 19 Ohio St. 586; *Mattison v. Marks*, 31 Michigan, 421.

Little Rock, Ark.

C. B. M.

RECENT PUBLICATIONS.

FEDERAL REPORTER DIGEST, vols. 1 to 20.—Digest of Decisions of U. S. Circuit and District Courts, reported in the Federal Reporter, vols. 1-20. With tables of Cases reported, Statutes cited and construed, Constitutions cited and construed, Index to Notes, etc. By Robert Desty. St. Paul: West Publishing Company, 1885.

This has the features of a good digest. In addition to other matter it has a "table of constitutions cited," showing the provisions of the constitution of the United States and those of the constitutions of the various States which have undergone examination. Following this is a "table of statutes cited, construed, etc." This is quite extensive and is worthy of much praise. Then follows an index to notes of cases, from which it would appear that in the first twenty volumes of the *Federal Reporter* many notes, some of them by legal writers of prominence, have been appended, covering a large variety of topics. The table of cases is not a mere table of the cases digested, but it is a table of cases overruled, followed, applied, cited, affirmed, etc. The fate of many of the cases is traced into the Supreme Court of the United States, and where cases have been cited, approved, doubted, distinguished or overruled in subsequent volumes of the same series, the fact is noted. Where the cases are reported in another series of reports, that fact is also noted. The whole is supplemented by a general index. Altogether this is evidently a well constructed digest of the first twenty volumes of one of the most useful series of reports now issued.

AMERICAN DECISIONS, VOL. 64.—The American Decisions, containing the Cases of General Value and Authority decided in the Courts of the several States, from the earliest Issue of the State Reports to the year 1869. Compiled and annotated by A. C. Freeman, Counselor at Law. Vol. LXIV. San Francisco: A. L. Bancroft & Company. 1885.

This volume contains learned and useful notes on the following subjects: Liability for Acts done under Unconstitutional Statute, p. 51; Agreement to Accept Less Sum than Amount Due, p. 138; Payee in Promissory Note must be designated with Certainty, p. 156; Conveyance by Trustee, p. 190; Liability to Support Poor Relations, p. 279; Right of Tenant for Life to Estovers, p. 367; Negotiability of Bonds, p. 428; Receiver, when and over what Property will be Appointed, p. 482; Liability of Carriers of Passengers, p. 521; Subterranean or Percolating Waters, p. 727.

JETSAM AND FLOTSAM.

CRIME IN ENGLAND.—We are able to chronicle the gratifying fact that during the last decade crime has been steadily decreasing in England, and that the population of the English prisons is now on the decrease. We learn that pauperism is also diminishing in that country. We are sorry, however, to learn that hydrophobia is on the increase.

OLIVER TWIST'S DESIRE FOR MORE.—THE CENTRAL LAW JOURNAL, in a Thanksgiving number, prints two pages and a half of interesting letters from its subscribers, "spiced with plenty of good advice about how to run a law journal." Naturally enough, some attribute more importance to the editorial articles; some, more to the digest; some prefer more space given to annotated cases; while others take special interest in the current information on personal and professional subjects. As a whole, the various requests of the subscribers—like Oliver Twist's desire for more—confirm the general good judgment with which the columns of the JOURNAL are made up. One lawyer well says: "The tendency of the country lawyer is towards dry rot, especially when he begins to be a little old. I feel it, and am determined to combat it. So you may give me the progress of law reform," &c. This tendency is not confined to the profession in the country. We all need to see more than we can see in our own routine of work, if we would keep abreast of the times.—*Daily Register* (N. Y.)

HOW TO MAKE A LAWYER.—A day or two ago when a young man entered a Detroit lawyer's office to study law, the practitioner sat down beside him and said: "Now see here, I have no time to fool away, and if you don't pan out well I won't keep you thirty days. Do you want to make a good lawyer?" "Yes sir," said the student. "Well, now listen. Be polite to old people, because they have cash. Be good to the boys' because they are growing up to a cash basis. Work in with the reporter and get puffs. Go to church for sake of example. Don't fool any time away on poetry, and don't even look at a girl until you can plead a case. If you can follow these instructions you will succeed. If you cannot, go and learn to be a doctor and kill your best friends."—*Detroit Free Press*.

FUNNY LAWSUITS.—Several cases reported in the daily papers have the merit of novelty. In one, a man sued a town and recovered damages for the loss of a pair of horses last winter by the ice breaking while he was crossing a river. In another, a widow sued the owners of a steamboat for permitting her husband to drown himself while intoxicated. And in another, Tom Lat and Ah Quong sue a daily paper for publishing a rumor that leprosy existed in their laundry.—*Weekly Law Bulletin*.

A BAD FORM OF LITIGANT IN PERSON.—An individual, who appeared to receive a wide berth from advocates and criers, pushed his way to Mr. Justice C. with a handful of papers and desired to be heard, when the following dialogue occurred:—*His Honor*: "You say you are sued in ejectment and you have the small-pox in your house?" *Defendant*: "Yes, your honor, and I want you to examine these papers."—*His Honor*: "This man has been after me several times this morning to examine his papers, and I have told him to go home and I will continue his case. Perhaps the lawyer in the case will be kind enough to come here and examine these dirty papers himself, as the action appears to be an action in ejectment for three dollars." The erler then tried in vain to expel the aggrieved litigant, but when the latter turned to resist, invariably fled from him. A messenger was sent for the sanitary police, but before their arrival the carrier of contagion had disappeared. The windows were opened and the distribution of justice was resumed with a sense of relief.—*Montreal Legal News*.

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